Supreme Court, U.S.
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No. 06-11

In the Supreme Court of the United States

MICHELE ECKELBERRY,
in her capacity as beneficiary, et al.,
Petitioners,

v.

RELIASTAR LIFE INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On March 19, 2004, Earl Eckelberry, the husband of Michele Eckelberry, died in a single car accident. At the time of the accident, Mr. Eckelberry had a blood alcohol level of .15%. Reliastar Life Insurance Company denied coverage on the basis that because Mr. Eckelberry was driving under the influence of alcohol, his death could not be considered an "accident" as defined by the Accidental Death & Dismemberment plan that Mr. Eckelberry participated in through his employer. The United States District Court for the Southern District of West Virginia found that Reliastar's interpretation of "accident" was not reasonable, and that the AD&D benefits should be paid. The Fourth Circuit Court of Appeals reversed and remanded.

The questions presented for review is:

When a person is negligent, to any degree, in causing an automobile wreck that results in their own death, has that person died as a result of an accident?

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Michele Eckelberry, the Petitioner, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Opinion and Order of the United States District Court for the Southern District of West Virginia is reproduced at App. 17a. The November 17, 2006, Order of the Court of Appeals is produced at App. 1a.

JURISDICTION

The United States Court of Appeals of Appeals entered its judgment on November 17, 2006.

The jurisdiction of the Fourth Circuit was invoked pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 10(a) and (c) in that the United States Court of Appeals for the Fourth Circuit has decided a Federal Question involving the Employee Retirement Income Security Act (ERISA) 29 U.S.C. § 1001, *et. seq.* that is in conflict with other circuits and is an important question of federal law that should be resolved by this Court.

STATUTES INVOLVED

Relevant provisions of 29 U.S.C. § 1022 provide:

> "(a) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be

understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan."

* * *

"(b) The summary plan description shall contain the following information: . . . the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits . . . ."

Relevant provisions of 29 U.S.C. § 1104 provide:

"(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--
(A) for the exclusive purpose of:
(i) providing benefits to participants and their beneficiaries; and
(ii) defraying reasonable expenses of administering the plan;
(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;"

STATEMENT OF THE CASE

Earl Eckelberry was employed by Ames True Temper, Inc., in Parkersburg, West Virginia. As an employee, he obtained an Accidental Death and Dismemberment ("AD&D") insurance policy from Reliastar Life Insurance Company. He named his wife, Michele Eckelberry, as beneficiary.

On March 19, 2004, he was traveling on U.S. Route 50E, near Parkersburg, West Virginia, when his automobile left the road and collided with an illegally parked tractor-trailer resulting in the death of Mr. Eckelberry. Toxicology reports found that he had a blood alcohol concentration of .15%. The certificate of death listed the manner of death as "accident."

Michele Eckelberry filed her claim for benefits under the Reliastar AD&D plan on March 31, 2004. In its denial of Ms. Eckelberry's claim, Reliastar admitted that Earl Eckelberry had died, "as a result of injuries he received while driving his vehicle." However, Reliastar also stated that the injuries were "not unexpected" because Mr. Eckelberry was driving under the influence of alcohol. It is important to note, that while Reliastar made reference to the fact that Mr. Eckelberry had a blood alcohol content level measured at 0.15%, the decision was based on the fact that Mr. Eckelberry was "under the influence of alcohol," and not on the basis that Mr. Eckelberry was over the legal limit. No evidence was presented at the administrative level to show that driving under the influence of alcohol made any subsequent accident "not unexpected."

Ms. Eckelberry filed her suit to recover the benefits under the Reliastar AD&D plan. In her complaint, she noted that the defendant had improperly denied her claim because of the

improper determination that the death of Earl Eckelberry was not an accident. In its answer, the defendant relied upon prior decisions of the Fourth Circuit Court of Appeals to support it's contention that Mr. Eckelberry's death was not the result of an accident.

Lower court proceedings

The jurisdiction of the district court is based on 29 U.S.C. § 1451(c). The jurisdiction of the Circuit Court is based upon 28 U.S.C. § 1291.

The district court ruled that Reliastar's interpretation of the definition of accident as it appears in the AD&D plan was not reasonable. As a result, the district court ruled that Ms. Eckelberry's claim for death benefits was not properly denied. App. at 17a.

The Fourth Circuit Court of Appeals on November 17, 2006, reversed the lower court=s ruling on the ground that it was reasonable for Reliastar to conclude that because the plan beneficiary put himself in a position in which he should have known serious injury or death could occur, his death was not unexpected, and ordered the district court to enter judgment for the defendant. App. at 1a.

REASONS FOR GRANTING THE PETITION

When a person is negligent, to any degree, in causing an automobile wreck that results in their own death, has that person died as a result of an accident?

> What is an accident? Everyone knows what an accident is until the word comes up in court. Then it becomes a mysterious phenomenon, and in order to

> resolve the enigma, witnesses are summoned, experts testify, lawyers argue, treatises are consulted and even when a conclave of twelve world-knowledgeable individuals agree as to whether a certain set of facts made out an accident, the question may not yet be settled, and it must be reheard in an appellate court.

West v. Ætna Life Insurance Co., 171 F. Supp.2d 856, 880 (N.D. Iowa 2001).

The various circuits of this country have only added to the confusion as to "What is an accident?" The Fourth Circuit was provided with all of the supporting statistics regarding the likelihood of death, or even serious injury, resulting from drunk driving, and it inexplicably failed to address them, as it has failed to do at every turn. As in prior cases involving this subject, the Fourth Circuit first claims to be applying the test set forth in *Wickman v. Northwestern National Insurance Co.*, 908 F.2d 1077 (1st Cir. 1990) to determine "whether a reasonable person, with a background and characteristics similar to the insured, would have viewed the injury as **highly likely** to occur. . .", but then goes on to find that "Reliastar's determination that 'Eckelberry's death was not unexpected because he put himself in a position in which he should have known serious injury or death **could** occur' finds considerable support in the record." (emphasis added) App. at 1a. The entire sum of the briefing and oral argument before the Fourth Circuit consisted of focusing that court's attention on the fact that there was no statistical basis to conclude that driving under the influence created a situation in which serious injury and/or death was highly likely to occur. A large part of the briefing and oral argument before the Fourth Circuit focused on the fact that prior decisions of the Fourth Circuit had decided cases involving driving under the influence based solely on popular opinion regarding drunk driving, instead of

the hard statistical evidence that should characterize a judicial decision that takes away a beneficiaries rights, and which would seem to be required under the rules of ERISA by the plan administrator when making this type of decision. Despite all of this focus on these issues, the best the Fourth Circuit could come up with once again was an opinion in which that court did not want to diminish the "personal responsibility" of driving under the influence. App. at 1a.

The Fourth Circuit mysteriously states that "We do not understand Reliastar to have applied a per se rule to Eckelberry's case. The simple fact that drunk driving occurred does not mean there was no accident under the policy." Presumably, this was intended to make up for the fact that Reliastar did not have a exclusion in its plan regarding driving under the influence. The court never bothered to explain, however, under what circumstances this would not be a per se rule, and given the ultimate decision of the Fourth Circuit, it appears that this IS a per se rule in this circuit, despite all of the evidence to the contrary and despite the total lack of evidence in support. App. at 1a.

Finally, the Fourth Circuit attempts to draw a distinction between driving under the influence, a misdemeanor, and other crimes such as speeding, talking on a cellular phone, etc., which are also misdemeanors (at least in some jurisdictions). The court makes the distinction based on the "fact" that the dangers of drunk driving are "widely known and widely publicized." From this, and given the fact that the statistics do not support that drunk driving is "highly likely," or even more likely than not, to occur, the Fourth Circuit reaffirms its rule that the *appearance* that something is true is sufficient to support a denial of AD&D benefits under ERISA, even if the appearance of truth has been demonstrated to be false. App. at 1a.

The Ninth Circuit Court of Appeals in an autoerotic asphyxiation case held that, "A death or injury may be 'deemed 'accidental' under a group accidental insurance policy established under ERISA if the death [or injury] was unexpected or unintentional'." *Padfield v. AIG Life Insurance Co.*, 290 F.3d 1121, 1126 (9th 2002)(quoting 10 COUCH ON INSURANCE 3d, ERISA Cases § 139:16 at 139-38 to 139:39 (1998); *See also Todd v. AIG Life Insurance Co.*, 47 F.3d 1448, 1456 (5th Cir. 1995)(holding death is an accident if deceased expected to survive and death was not substantially certain from the actions of the deceased) and *Critchlow v. First UNUM Life Insurance Co. of America*, 378 F.3d 246 (2nd Cir. 2004)(holding there is no difference between engaging in autoerotic asphyxiation and engaging in hazardous extreme-sports activities).

The Eight Circuit Court of Appeals ruled that a death resulting from the deceased driving while intoxicated was an accidental death under ERISA. *King v. Hartford Life and Accident Insurance Co.*, 357 F.3d 840 (8th Cir. 2004)(*reh'g en banc granted* April 6, 2004). The district court in *King* had ruled that "death [is] a foreseeable outcome of driving a motorcycle while intoxicated." *Id.* at 842.

In reversing the district court the Eight Circuit rejected the test of whether death was reasonably foreseeable and instead stated the "test must be viewed from the particular perspective of a reasonable person in the insured's position. . . . [A]n insured must have both a subjective intent and an objective expectation of not being injured." *Id.* at 845.

The Eight Circuit applied the same test that was applied in the three autoerotic asphyxiation cases discussed above. The Fourth Circuit did not apply that test but instead agreed, without any factual basis, that death was the natural and

probable consequence of driving while intoxicated. The Fourth Circuit did not view the facts from the perspective of Mr. Eckelberry, as would have been required by the Fifth, Eighth and Ninth Circuits.

The Eight Circuit relied upon the treatise opinion of *West* v. *Ætna Life Insurance Company*, 171 D. Supp. 2d 856 (N.D. Iowa 2001). In *West*, a case also involving the death of an intoxicated driver, the court, after an analysis of the prevailing law, concluded, based in part upon statistical information, that the deceased did in fact die as a result of an accident. The court rejected an analysis based upon whether death is "foreseeable." *Wickman v. Northwestern National Insurance Co.*, 908 F.2d 1077 (1st Cir. 1990), the case relied upon by *West*, held the question is "[W]hether a reasonable person, with background and characteristics similar to the insured, would have viewed the injury as *highly likely* to occur as a result of the insured's intentional conduct." *Wickman* at 1088 (emphasis added).

In *West*, the court then analyzed the statistical information provided and concluded:

> [T]he leap cannot be made from 'serious risks,' *i.e.* the *possibility* of injury or death, that are 'widely publicized' to the conclusion that a drunken driver knew or should have known that the consequences of driving while intoxicated are that he or she is 'highly likely' to suffer injury or death, *i.e.* the *probability* of injury or death.

West at 903 (emphasis in original). The court then concluded:

> [A]lthough alcohol was a factor in a significant percentage of fatalities, common sense and logic

> suggest that if it were indeed 'highly likely' that a person driving while intoxicated would suffer a serious injury or be killed, the number of alcohol related fatalities in 1996, in light of the number of arrests for driving under the influence, should have been vastly greater than 17,218.

Id. at 904[1]

The district court in this case, recognizing that the Fourth Circuit had never actually gone through the steps of applying the *Wickman* test to any of the drunk driving cases that had come before it, did so in Mr. Eckelberry's case. The result was a memorandum opinion that addressed the various standards and the statistical evidence to conclude, among other things:

> When *Wickman's* two-step test is applied to the case at bar, it becomes obvious that Mr. Eckelberry's death was an accident. . . . Reviewing the evidence regarding the odds of dying when drinking and driving, it cannot be said that a reasonable person can view drinking and driving as reasonably foreseeable, let alone "highly likely," to cause death.

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[1] The statistic relied upon by the court in *West* establish that in 1996, there were 1,033,000 arrests for driving under the influence and only 17,218 alcohol related fatalities. *West* at 904. According to the Source Book for Justice Statistics for 2000, an accident is an "alcohol related accident" "if either a driver or non motorist (usually a pedestrian) has a measurable or estimated blood alcohol concentration (BAC) of 0.01 or more grams per deciliter." An alcohol related accident is not the same as an alcohol caused accident. The number of deaths caused by drunk driving is, therefore, less than 17,218.

App. at 17a. The district court went so far as to say, "To hold otherwise is to impute society's moral concerns about drunk drivers ahead of sound reason." This is exactly what the Fourth Circuit did when it decided to ignore all statistical evidence and once again reaffirm that it would not assist in reducing the "personal responsibility" of drunk drivers. This wife, this circuit, indeed this country, is entitled to a sound legal opinion that addresses the facts and evidence regarding this issue instead of more politically correct posturing that perpetuates the deception of plan beneficiaries. The unnecessary moral clause is causing harm to a class of innocent persons who need protection, surviving spouses and children.

The Seventh Circuit in *Santaella v. Metropolitan Life Insurance Co.*, 123 F.3d 456 (7th Cir. 1997), an ERISA case, has also applied a different standard from the one used by the Fourth Circuit. In *Santaella*, the court found the death to be accidental when the deceased took an overdose of her prescription medicine Darvon. In finding the death to be accidental, the court said "Mrs. Eldridge had a subjective expectation of survival and . . . such an expectation was objectively reasonable because death was not certain or even highly likely to result from her conduct." *Id.* at 464. Under the analysis used by the Fourth Circuit, all Reliastar is required to establish is that death *could* happen, a far cry from even reasonable foreseeability, much less highly likely. Such an ill-defined standard is in total derivation for the real purpose behind an employee benefit plan.

As there are conflicting standards determining the meaning of an "accident," ERISA administrators are uncertain how to interpret the insurance policies they administer. Even more troubling is the dilemma of a plan administrator of a plan issued in one of the states in the

Fourth Circuit who has a plan beneficiary who dies while driving under the influence in one of the states of the Eighth Circuit. Under ERISA, whether a death is accidental should not depend upon which circuit the deceased is in when he dies.

Inconsistent application of *Wickman case*

While most courts that have addressed the issue of what is an accident claim to have applied the *Wickman* test, they have applied it inconsistently. The Eight Circuit in *King*, the Fifth Circuit in *Todd,* the Ninth Circuit in *Padfield* and the Second Circuit in *Critchlow* all discussed *Wickman* in terms of the act being an accident unless the act of the deceased is "substantially certain" to cause death or "highly likely" to cause death. Those cases follow the holding of *Wickman* which states that the act of the deceased is an accident unless death is "highly likely" from the actions of the deceased.

The Fourth Circuit in *Baker v. Provident Life & Accident Insurance Co.*, 171 F.3d 939 (4th Cir. 1999) and the Seventh Circuit in *Cozzie v. Metropolitan Life Insurance Co.*, 140 F.3d 1104 (1998) have both adopted the "reasonably foreseeable" test in driving under the influence cases. While both cases cite *Wickman*, neither case discusses how the term "reasonably foreseeable" is equated with "highly likely", the term used in *Wickman.*

The Seventh Circuit furthermore has apparently taken inconsistent positions with itself. While *Cozzie* discusses the concept of "reasonably foreseeable," the same circuit used a different approach in *Santaella.* As noted previously, in *Santaella* the deceased had taken an overdose of her prescription medicine Darvon. In holding the death to be an accident the court said "[E]mploying the methodology of

Todd and *Wickman*, we must conclude that the record requires the conclusion that Mrs. Eldridge had a subjective expectation of survival and that such expectation was objectively reasonable because the death was not certain or even highly likely to result from her conduct." *Santaella* at 464. The court in *Cozzie*, decided about nine months after *Santaella* did not discuss this inconsistency.[2] Surely death from taking an overdose of Darvon is as reasonably foreseeable as death from driving under the influence, if not more so.

The Fourth Circuit has likewise taken inconsistent positions. Under similar contract provisions prior to the enactment of ERISA, the Fourth Circuit had held that a reasonably foreseeable standard does not apply. The Fourth Circuit has long recognized that accidental life insurance plans protect the plan beneficiary from their own misjudgments unless the policy specifically excludes the conduct. *See, e.g. Metropolitan Life Ins. Co. v. Henkel*, 234 F.2d 69 (4th Cir. 1956)(wreck that occurred while fleeing from the police at 90 miles per hour deemed to be an accident); *Pilot Life Ins. Co. v. Ayers*, 163 F.2d 860 (4th Cir. 1947)(falling from window while intoxicated deemed to be an accident); *Zurich General Accident & Liability Ins. Co. Ltd., v. Flickger*, 33 F.2d 853 (4th Cir. 1929)(death as a result of consuming "bootleg whiskey" containing wood alcohol deemed to be an accident). The Fourth Circuit in this case failed to explain why the contract interpretation in those cases was not applicable in this case.

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[2] In *Cozzie* the Seventh Circuit was reviewing the finding under the arbitrary and capricious standard. The court indicated they may not have reached the same result under a de novo review. *Cozzie* at 1111.

The Fourth Circuit has held that:

> When interpreting an ERISA health insurance plan, we utilize and apply ordinary principles of contract law . . . . When, however, a term used in a plan is ambiguous, that ambiguity is construed against the drafter of the plan, and it is construed in accordance with the reasonable expectations of the insured.

Bynum v. CIGNA Healthcare of North Carolina, Inc., 287 F.3d 305, 313-314 (4th Cir. 2002)(abuse of discretion standard of review). A fiduciary is in no better position to interpret ordinary words of a contract than are the courts.

The term "reasonably foreseeable" can also be defined as mere negligence. Under the definition of an accident as used in the Fourth Circuit and the Seventh Circuit in *Cozzie*, any act of simple negligence would preclude recovery by a finding that no accident occurred.

No one would dispute that it is reasonably foreseeable that if one speeds, one could have a wreck and die or receive serious injury. Likewise, it is reasonably foreseeable that if one talks on a cell phone while driving, drives while sleepy, runs a stop sign or simply goes fishing in a small boat without a life preserver, that death or serious injury could result. But in none of those reasonably foreseeable circumstances should a court declare that an accident has not occurred. "Generally, insureds purchase accident insurance for the very purpose of obtaining protection from their own miscalculations and misjudgments." *Wickman* at 1088. Under the reasonably foreseeable standard that was arguably used by Reliastar and the Fourth Circuit, that would not be true.

The problem with the "reasonably foreseeable" test has best been stated by one leading authority on insurance:

> The fact that injuries and death are 'foreseeable' in a general manner is the very reason that people purchase insurance against accidents - no one who found a plane crash 'unforeseeable' would purchase trip insurance. Almost all adverse events are 'foreseeable' in an abstract sense: being hit by a car while crossing the street, breaking a leg while skiing, dying from the effects of drugs (be they legal or illegal), even having a plane crash into your house.

COUCH ON INSURANCE 3d, *Accident Insurance: Introduction* § 139 at 139-29 (1998).

Application of ERISA principles

ERISA requires that plan administrators, such as Reliastar in this case, discharge the "duties with respect to a plan solely in the interests of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(a)(1). When a plan administrator gives a new and novel interpretation to the word "accident," the administrator is not complying with the terms of the plan.

ERISA further requires that a plan description be "written in a manner calculated to be understood by the average plan participant. . . ." 29 U.S.C. § 1022(a). The law further requires that the Summary Plan Description contain "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits. . ." 29 U.S.C. § 1022(b). Reliastar failed in its fiduciary obligation to Earl Eckelberry to clearly define the circumstances that would

deny him coverage. What the common man would deem to be an accident, Reliastar has decided is not an accident.

To define "accident" in terms of what is "reasonably foreseeable" is to simply include an exclusion that the average plan beneficiary would not expect. ERISA was passed to prevent the unexpected exclusions. As one author has noted:

> Absent an intent to commit suicide, coverage should always be available for an automobile crash regardless of the recklessness which precedes it. Even if one could demonstrate an insured's subjective appreciation of the dangers of drunk or otherwise imprudent driving, 'the common speech of men' is both unanimous and correct in describing such crashes as accidental. To hold otherwise is to sanction the deception of the public.

Adam F. Scales, *Man, God and the Serbonian Bog: The Evolution of Accidental Death Insurance* 86 IOWA L. REV.173, 302 (Oct. 2000). *See also,* Michael E. Gardner, *Accidential Death Insurance Coverage of Drunk Drivers*, 69 MO. LAW. REV. 235, 253 (2004)("[W]hen an insured dies as a consequence of his driving while intoxicated, his death should still be considered 'accidental' because a reasonable person would not view death as a natural and probable consequence of drunk driving.")

This Court has said "ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefits plans.' and 'to protect contractually defined benefits.'" *Firestone and Rubber Co. v. Bruch*, 489 U.S., 101 113 (1989). Under the interpretation of the policy applied by the Fourth Circuit, an employee has fewer protections after the passage of ERISA than before. As the Second Circuit has

said "Given that ERISA is not to be interpreted to afford employees and their beneficiaries less protection than they enjoyed before ERISA was enacted, . . . these principles governing exclusion clauses are no less applicable to an insurance policy governed by ERISA." *Critchlow v. First UNUM Life Insurance Co. of America*, 378 F.3d 246, 256 (2nd Cir. 2004).

Under the Fourth Circuit' case law before ERISA, Ms. Eckelberry would have prevailed. This Court's view of ERISA has been that ERISA affords more protection than before ERISA was passed. "Adopting Firestone's reading of ERISA would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Firestone,* at 113-114.

Numerous state court decisions have held that when a person dies from a wreck in which the deceased had a blood alcohol level in excess of the legal limit, the wreck is an accident. *Hearn v. Southern Life Insurance Co.*, 454 So.2d 932 (Ala. 1984); *Union Central Life Insurance Co.*, 103 Ga. App. 355, 119 S.E.2d 281 (1961); *Fryman v. Pilot Life Insurance Co.*, 704 S.W.2d 205 (Ky. 1986); *Consumers Life Insurance Co. v. Smith*, 587 A.2d 1119 (Md. Ct. Spec. App. 1990); *Schwartz v. John Hancock Mutual Life Insurance Co.*, 96 N.J. Super. 520, 233 A.2d 416 (Law Div. 1967); *Mozingo v. Mid-South Insurance Co.*, 29 N.C. App.352, 224 S.E.2d 208 (1976); *Cranfill v. Aetna Life Insurance Co.*, 49 P.703 (Okla. 2002); *Harrell v. Minnesota Mutual Life Insurance Co.*, 937 S.W.2d 205 (Tenn. 1996); *Freeman v. Crown Life Insurance Co.*, 580 S.W.2d 897 (Tex. Civ. App. 1979); *LDS Hospital v. Capitol Life Insurance Co.*, 765 P.2d 857 (Utah 1988). As noted by the Oklahoma Supreme Court, state

courts "have overwhelmingly" found the death of an intoxicated driver to be accidental. *Cranfill* at 707.

Congress did not intend for the courts to give an interpretation of a contract under ERISA that affords less protection to a beneficiary under ERISA than the beneficiary would have had without ERISA. Under the holding of the Fourth Circuit in this case, Michele Eckelberry, the beneficiary, has less protection under ERISA than she would have had without ERISA.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari* to resolve the conflict between the Second, Fifth, Seventh and Eighth Circuits and the Fourth and Seventh Circuit concerning this question involving the Federal Employee Retirement Income Security Act.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 06-1020
CA-04-1185-6

[Filed November 17, 2006]

MICHELE ECKELBERRY, in her capacity as beneficiary

Plaintiff - Appellee

v.

RELIASTAR LIFE INSURANCE COMPANY

Defendant - Appellant

Appeal from the United States District Court for the Southern District of West Virginia at Parkersburg

JUDGMENT

In accordance with the written opinion of this Court filed this day, the Court reverses the judgment of the District Court. This case is remanded to the District Court for further proceedings consistent with the Court's opinion.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1020

[Filed November 17, 2006]

MICHELE ECKELBERRY, in her capacity as beneficiary,	)
Plaintiff - Appellee,	)
v.	)
RELIASTAR LIFE INSURANCE COMPANY,	)
Defendant - Appellant.	)

Appeal from the United States District Court
for the Southern District of West Virginia, at Parkersburg.
Joseph Robert Goodwin, District Judge.
(CA-04-1185-6)

Before WILKINSON, MOTZ, and TRAXLER, Circuit Judges.

Reversed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Motz and Judge Traxler joined.

COUNSEL

ARGUED: Bradley J. Betlach, HALLELAND, LEWIS, NILAN & JOHNSON, P.A., Minneapolis, Minnesota, for Appellant. Charles Edward McDonough, WISEMAN LAW

FIRM, Vienna, West Virginia, for Appellee. **ON BRIEF:** Todd Wiseman, WISEMAN LAW FIRM, Vienna, West Virginia, for Appellee.

OPINION

WILKINSON, Circuit Judge:

Earl Eckelberry died after his vehicle crashed into the back of a parked tractor trailer. His ex-wife, Michele Eckelberry, sought accidental death benefits from ReliaStar Life Insurance Company, Eckelberry's insurer. ReliaStar denied the claim. Under the terms of the Plan, injuries are part of an "accident" only if they are "unexpected" and "the insured does not foresee" them. ReliaStar reasoned that because Eckelberry's blood-alcohol level was 50 percent higher than the legal limit, he knowingly put himself at risk for serious injury or death, and his injuries were therefore not "unexpected."

Ms. Eckelberry argued that ReliaStar's denial of benefits was unreasonable because, viewed subjectively, Eckelberry did not expect to crash, and because serious injury was not "highly likely." The district court agreed, reversing the Plan administrator's denial of benefits, and granting Ms. Eckelberry's motion for summary judgment. Because we conclude that ReliaStar's interpretation of "accident" was not unreasonable, we must reverse the judgment of the district court.

I.

On March 19, 2004, Earl Eckelberry was traveling east on U.S. Route 50 near Parkersburg, West Virginia. A tractor trailer, also facing east, was parked eight feet south of the

pavement edge on the highway berm. At approximately 3:49 a. m., Eckelberry lost control of his vehicle and ran headlong into the rear of the parked trailer. His blood-alcohol level was 0.15 percent – 50 percent higher than the legal limit of 0.10 percent. *See* W. Va. Code § 17C-5-2 (2004). At the time of the collision, Eckelberry was not wearing a seat belt. He was thrown from his vehicle and died of multiple traumatic injuries.

Plaintiff Michele Eckelberry is the named beneficiary of the Accidental Death and Dismemberment ("AD&D") insurance policy provided to Earl Eckelberry by his employer, Ames True Temper, Inc. ReliaStar insured the Plan and also acted as claims administrator. Under the terms of the Plan, ReliaStar will pay accidental death benefits if the insured dies "due to an accident." The Plan defined "accident" as "an unexpected and sudden event which the insured does not foresee." The Plan also provided that "ReliaStar Life has final discretionary authority to determine all questions of eligibility and status and to interpret and construe the terms of this policy(ies) of insurance."

On March 31, 2004, plaintiff filed an $86,000 claim for accidental death benefits with ReliaStar. ReliaStar's claims handler analyzed the Traffic Crash Report, the Toxicology Report, the Medical Examiner's Report, and the Death Certificate. ReliaStar then denied the claim on the ground that, because Eckelberry's blood-alcohol level was 50 percent higher than the legal limit, his injuries were not "unexpected" as required by the Plan's definition of "accident." ReliaStar's Appeals Committee affirmed, finding that Eckelberry had "put himself in a position in which he should have known serious injury or death could occur." By driving under the influence, he "knowingly pu[t] [him] sel[f] at risk for serious

injury or death." Accordingly, his death was not "unexpected" as required by the Plan.

Plaintiff filed suit in state court under state law claiming that ReliaStar had wrongfully denied benefits and seeking declaratory relief. ReliaStar removed to federal district court under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. (2000)("ERISA"). The district court reversed ReliaStar's benefits determination and, in granting summary judgment to plaintiff, held that ReliaStar had unreasonably interpreted the Plan's definition of "accident." Specifically, the court found that ReliaStar's interpretation ran afoul of the clear language of the policy, the federal common law definition of accident, and the goals of the Plan. *Eckelberry v. ReliaStar Life Ins. Co.*, 402 F. Supp. 2d 704 (S.D.W. Va. 2005).

ReliaStar appeals.

II.

We review the district court's summary judgment ruling *de novo*, applying the same legal standard used by the district court. *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1127-28 (4th Cir. 1987). As the parties agree, where an ERISA plan vests the administrator with "discretionary authority to determine eligibility for benefits or to construe the terms of the plan," as this Plan does, courts review an administrator's decision for abuse of discretion. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989); *see also Baker v. Provident Life & Accident Ins. Co.*, 171 F.3d 939, 941 (4th Cir. 1999). Under this standard, we do not search for the best interpretation of a plan or even for one we might independently adopt. Rather, when reviewing a plan administrator's decision, a court "will not

disturb any reasonable interpretation." *Baker*, 171 F.3d at 941 (citation omitted). Where a potential conflict of interest exists, however, we employ a more searching review; the deference due the plan administrator is "lessened to the degree necessary to neutralize any untoward influence resulting from the conflict." *Doe v. Group Hospitalization & Med. Servs.*, 3 F.3d 80, 87 (4th Cir. 1993) (citing *Restatement (Second) of Trusts* § 187 cmt. d (1959)). Here, because the plan administrator, ReliaStar, also acts as insurer, we review its denial under this modified abuse of discretion standard. *Baker*, 171 F.3d at 941.

When interpreting the benefits provisions of ERISA-regulated insurance plans, the plain language is paramount. *Id.* at 942; *see also Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 57-58 (4th Cir. 1992). We begin, therefore, with the Plan's terms. The Plan states that ReliaStar pays accidental death benefits if the insured dies "due to an accident."

The Plan defines "accident" as "an unexpected and sudden event which the insured does not foresee," so to qualify under the Plan an accident must be both "unexpected" and an event "the insured does not foresee." ReliaStar's Plan does not, however, define "unexpected" or "foresee[able]." Because the Plan's undefined terms and indeed the term "accident" are not always susceptible to easy application, many federal courts have adopted the framework laid out in *Wickman v. Northwestern National Insurance Co.*, 908 F.2d 1077 (1st Cir. 1990), to clarify the meaning of "unexpected." Initially, the court asks whether the insured subjectively expected his actions to result in injury or death. *Id.* at 1088. If the insured "did not expect an injury," the fact-finder must "examine whether the suppositions which underlay that expectation were reasonable" and must do so "from the perspective of the insured." *Id.* However, "if the fact-finder, in attempting to

accurately determine the insured's actual expectation, finds the evidence insufficient to accurately determine the insured's subjective expectation, the fact-finder should then engage in an objective analysis of the insured's expectations." *Id.* (citation omitted). This "objective analysis" asks "whether a reasonable person, with background and characteristics similar to the insured, would have viewed the injury as highly likely to occur as a result of the insured's intentional conduct." *Id.* (citation omitted).

In *Baker v. Provident Life & Accident Insurance Co.*, 171 F.3d 939, 942-43 (4th Cir. 1999), this court suggested that it would apply *Wickman's* test to drunk driving collisions. Here, as in *Wickman*, there is no evidence in the administrative record from which "the insured's subjective expectation" can be "accurately determined." *Wickman*, 908 F.2d at 1088. Thus, again as in *Wickman*, we proceed to the "objective analysis," and consider "whether a reasonable person, with background and characteristics similar to the insured, would have viewed the injury as highly likely to occur as a result of the insured's intentional conduct." *Id.* (citation omitted).

III.

ReliaStar denied benefits on the ground that the insured's death was not "unexpected" because he "put himself in a position in which he should have known serious injury or death could occur." Plaintiff contends, however, that it was unreasonable for ReliaStar to conclude that the particular collision at issue here was not an "accident." Specifically, plaintiff maintains that she is entitled to accidental death benefits because (1) drunk-driving injuries are not "highly likely" to occur; and (2) ReliaStar's interpretation of "accident" would "frustrate the purpose of AD&D insurance."

A.

Plaintiff first argues that ReliaStar's interpretation of "accident" was unreasonable because drunk-driving injuries are not "highly likely" to occur. We cannot agree with plaintiff's argument. Whether the test is one of high likelihood,[1] or reasonable foreseeability,[2] federal courts have

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[1] Courts have used a number of different formulations to describe the objective portion of the *Wickman* inquiry. The following are best classified as requiring a standard akin to "highly likely." *See, e.g., Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1127 (9th Cir. 2002) (holding insured's death by autoerotic asphyxiation was "accidental" because a reasonable person would not have viewed death as "substantially certain" to result); *Todd v. AIG Life Ins. Co.*, 47 F.3d 1448, 1456 (5th Cir. 1995) (same); *Walker v. Metro. Life Ins. Co.*, 24 F. Supp. 2d 775, 782 (E.D. Mich. 1997) (holding insured's drunk driving death was not "accidental" because a reasonable person would have viewed serious injury or death as "highly likely to result"); *see also Wickman*, 908 F.2d at 1080, 1088-89 (holding insured's death by forty foot fall was not "accidental" because a reasonable person "would have viewed the injury as highly likely to occur as a result of the insured's intentional conduct").

[2] See *Cozzie v. Metro. Life Ins. Co.*, 140 F.3d 1104, 1109-10 (7th Cir. 1998) (upholding plan administrator's interpretation of "accident" as an event that is not "reasonably foreseeable"); *see also King v. Hartford Life & Accident Ins. Co.*, 414 F.3d 994, 1002 (8th Cir. 2005) (discussing objective standard in terms of both reasonable foreseeability and high likelihood); *Jones v. Metro. Life Ins. Co.*, 385 F.3d 654, 665 (6th Cir. 2004) (discussing objective standard in terms of insured's "objectively reasonable" expectations); *Buce v. Allianz Life Ins. Co.*, 247 F.3d 1133, 1147 (11th Cir. 2001) (same); *Baker*, 171 F.3d at 942-43 (discussing

found with near universal accord that alcohol-related injuries and deaths are not "accidental" under insurance contracts governed by ERISA. *See, e.g., Cozzie v. Metro. Life Ins. Co.*, 140 F.3d 1104, 1109-10 (7th Cir. 1998); *Weatherall v. ReliaStar Life Ins. Co.*, 398 F. Supp. 2d 918, 924 (W.D. Wis. 2005); *Mullaney v. Aetna U.S. Healthcare*, 103 F. Supp. 2d 486, 494 (D.R.I. 2000); *Sorrells v. Sun Life Assurance Co.*, 85 F. Supp. 2d 1221, 1232-35 (S.D. Ala. 2000); *Walker v. Metro. Life Ins. Co.*, 24 F. Supp. 2d 775, 782 (E.D. Mich. 1997); *Schultz v. Metropolitan Life Ins. Co.*, 994 F. Supp. 1419, 1422 (M.D. Fla. 1997); *Nelson v. Sun Life Assurance Co.*, 962 F. Supp. 1010, 1012 (W.D. Mich. 1997); *Miller v. Auto-Alliance Int'l, Inc.*, 953 F. Supp. 172, 176-77 (E.D. Mich. 1997); *Cates v. Metro. Life Ins. Co.*, 14 F. Supp. 2d 1024, 1027 (E.D. Tenn. 1996), *aff'd*, 149 F.3d 1182 (6th Cir. 1998); *Fowler v. Metro. Life Ins. Co.*, 938 F. Supp. 476, 480 (W.D. Tenn. 1996).

These courts have applied the objective foreseeability test set forth in *Wickman* and reasoned that since "the hazards of drinking and driving are widely known and widely publicized" the insured should have known that driving while intoxicated was highly likely to result in death or bodily harm. As one district court put it, "All drivers know, or should know, the dire consequences of drunk driving. Thus, the fatal result that occurred in this case should surprise no reasonable person." *Nelson*, 962 F. Supp. at 1012. Ordinarily, "a death that occurs as a result of driving while intoxicated . . . is not an 'accident' because that result is reasonably foreseeable."

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objective standard in terms of "reasonabl[e] foreseeab[ility]"); *see also Wickman*, 908 F.2d at 1089 (discussing objective standard in terms of what plaintiff "reasonably should have expected").

Baker, 171 F.3d at 942; *see also Jones v. Metro. Life Ins. Co.*, 385 F.3d 654, 665 (6th Cir. 2004); *Cozzie*, 140 F.3d at 1109-10; *Wickman*, 908 F.2d at 1089 (holding that an injury is not accidental if "a reasonable person in [the insured's] shoes would have expected the result.").

In *Cozzie v. Metropolitan Life Insurance Co.*, the Seventh Circuit applied the *Wickman* framework to a similar claim for accidental death benefits resulting from driving under the influence. 140 F.3d at 1110. The insured there missed a curve in the road and was killed in a single-car crash – his blood-alcohol concentration was 0.252 percent, over twice the legal limit. *Id.* at 1106. The ERISA plan at issue did not define "accident." *Id.* at 1109. The Seventh Circuit nevertheless upheld the plan administrator's denial of benefits, finding that the administrator's interpretation of "accident" – an event that is not "reasonably foreseeable" – was not unreasonable. *Id.* at 1108, 1111.

We do not understand ReliaStar to have applied a per se rule to Eckelberry's case. The simple fact that drunk driving occurred does not mean there was no accident under the policy. If the insurer did not intend to cover any injury to a drunk driver, then drunk driving would have been a specific exclusion listed in the plan. Rather, ReliaStar's determination that "Eckelberry's death was not unexpected because he put himself in a position in which he should have known serious injury or death could occur" finds considerable support in the record.

Both the facts and the inferences that could reasonably be drawn from them remain uncontradicted by any evidence submitted on Eckelberry's behalf. As the Wood County Sheriff's report makes clear, Eckelberry's car crash was perfectly consistent with his inebriated state. While under the

influence of alcohol, Eckelberry lost control of his vehicle at 3:49 a.m. and ran headlong into a parked semi-trailer located eight feet beyond the highway shoulder. He was not wearing a seat belt. Most critically, Eckelberry's blood-alcohol concentration was 0.15 percent – 50 percent higher than the legal limit. According to the toxicology report issued by West Virginia's Office of Chief Medical Examiner, the "[t]ypical effects" of a blood-alcohol concentration of 0.15 percent include "blurred vision, loss of motor coordination and impaired judgment."

Every state criminalizes drunk-driving. Under West Virginia law any person who drives a vehicle with a blood-alcohol level in excess of the legal limit is guilty of a misdemeanor and, upon conviction for a first offense, shall be fined not less than $100 and sentenced to a jail term of up to six months. W. Va. Code § 17C-5-2(d)(1)(E)(2). A person convicted of violating § 17C-5-2(d)(1)(E) for the second time is also guilty of a misdemeanor and sentenced to a jail term of six to twelve months. *Id.* § 17C-5-2(j). A third-time offender is guilty of a felony and, upon conviction, sentenced to a state prison term of one to three years. *Id.* § 17C-5-2(k). These graduated penalties, and the degree to which they increase according to the number of prior offenses, reflect a recognition of the seriousness of the problem of drunk drivers which is far beyond that of most other driving infractions.

Moreover, at the time of Eckelberry's collision, no state in the country had a legal limit approaching 0.15 percent. Gregory T. Neugebauer, *Alcohol Ignition Interlocks: Magic Bullet or Poison Pill*, 2 U. Pitt. J. Tech. L & Pol'y 2, 2 (2002) (noting that in 2002 every state had a blood-alcohol limit of 0.10 percent or less). West Virginia's legal limit was 0.10 percent. *See* W. Va. Code § 17C-5-2. Plaintiff thus cannot be heard to claim that a reasonable person would be

unaware of the dangers of driving under the influence of significant alcohol consumption.

To assess whether "a reasonable person in [the insured's] shoes would have expected the result," Wickman, 908 F.2d at 1089, ReliaStar was entitled to take into account the substantial criminal consequences that often attach to an insured's decision to drive while intoxicated. These criminal laws stem, in part, from the fact that driving under the influence threatens not only the life of the impaired driver, but also the lives of other motorists. *See Baker*, 171 F.3d at 941 (inebriated driver convicted of involuntary manslaughter after killing another motorist). As West Virginia's highest court has noted, "operating an automobile while under the influence is reckless conduct that places [West Virginia citizens] at great risk of serious physical harm or death." *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 583 S.E.2d 800, 813 (W. Va. 2002) (quotation omitted).

Embracing Eckelberry's broad view of accident would eliminate the distinction this court has long recognized between intended and highly likely consequences. *See, e.g., Baker*, 171 F.3d at 942-43. Russian Roulette, an archetype of the unreasonable forecast, provides a useful paradigm. To be sure, while an insured may not intend to die when he places a single cartridge into a pistol, spins the cylinder, places the gun to his forehead, and pulls the trigger, such a result is not just an unfortunate accident. *See Wickman*, 908 F.2d at 1087. Similarly, out of a desire to avoid being shot, burglars typically choose empty homes to rob. But if an armed occupant is indeed home, we would not regard the burglars being shot as an "accident" in the same way we would treat a misfire at the shooting range. Likewise, even if Eckelberry did not intend to crash his car into a parked semi-truck, that intention does not alone render a result "accidental." To put

it simply, unjustifiable optimism about one's odds (or failure even to calculate them) does not relieve conduct such as Eckelberry's of foreseeable results.

In sum, we are hard pressed to say that a death must be deemed accidental where a decedent voluntarily gets behind the wheel after voluntarily drinking too much. By choosing to drive under circumstances where his vision, motor control, and judgment were likely to be impaired, the insured placed himself and fellow motorists in harm's way. To characterize harm flowing from such behavior as merely "accidental" diminishes the personal responsibility that state laws and the rules of the road require. This case, in short, affords us no basis for concluding that ReliaStar's denial of benefits was unreasonable.

B.

Plaintiff also argues that ReliaStar's interpretation of "accident" is contrary to the goals of the Plan because it would "frustrate the purpose" of AD&D insurance by taking the "accident" out of accident. Again, we disagree. While we are not unsympathetic to the fact that the claimant in this case may be denied recovery, an ERISA fiduciary must also provide for future applicants. Indeed, where a plan administrator denies an unmeritorious claim, the financial health of pooled plan assets is protected, not "frustrate[d]." *See Cozzie*, 140 F.3d at 1110. As the Seventh Circuit has noted, the purpose of AD&D insurance is to provide "against the tragedy of *unexpected* death." *Id.* (emphasis added). We cannot characterize as incompatible with the Plan, therefore, ReliaStar's determination that the Plan's best interests are served by limiting the Plan's definition of "accident" to "unexpected" events that are not highly likely to occur. Nor can we say that it is unreasonable for plan administrators to

acknowledge the difference between ultra-hazardous drunk-driving deaths and other tragedies which do not "involve such a significant assumption of a known risk by the insured." *See id.*

IV.

Finally, we emphasize the boundaries of our holding. We do not suggest that plan administrators can routinely deny coverage to insureds who engage in purely negligent conduct or, for example, to anyone that speeds. In fact, accident insurance is often purchased to cover negligence at its most typical: Insureds seek "protection from their own miscalculations and misjudgments." *Wickman*, 908 F.2d at 1088 (citations omitted). In this regard, the district court's comparison of those who drive drunk to those who apply lipstick, fiddle with the radio dial, or restrain a child is inapt. *See Eckelberry*, 402 F. Supp. 2d at 712. While these actions are hardly commendable driving habits, they do not generally rise to the level of crimes. Indeed, even though acts like speeding and (in some jurisdictions) driving while talking on a cellular phone are illegal, none compare to driving while drunk, which has long been "widely known and widely publicized" to be both illegal and highly dangerous. *See Fowler*, 938 F. Supp. at 480.

Although some courts have suggested that car crashes caused by drunk driving can never be accidents, *see, e.g., Mullaney*, 103 F. Supp. 2d at 495, we cannot anticipate every future set of circumstances and do not adopt a per se rule. Rather, it is well settled that a plan fiduciary must assess all of the facts and circumstances attending a claim, afford the insured adequate opportunity to address the causes and circumstances surrounding any occurrence, and make a reasoned, principled assessment supported by substantial

evidence. *See, e.g., Brogan v. Holland*, 105 F.3d 158, 161 (4th Cir. 1997) (citing *Bernstein v. CapitalCare, Inc.*, 70 F.3d 783, 788 (4th Cir. 1995)). Here, however, the undisputed facts presented to the Plan administrator go a long way toward establishing that the insured's death was not accidental.

We in no sense intend to make light of the loss that plaintiff has suffered. We simply confirm as a matter of law that the Plan administrator's ruling was a reasonable one under the policy as written. The insured's conduct went beyond the careless and imprudent. Under the circumstances here, we think it was reasonable for ReliaStar to conclude that because the insured "put himself in a position in which he should have known serious injury or death could occur" his death was not "unexpected." Accordingly, the judgment of the district court is reversed, and we remand with instructions to enter judgment for the defendant.

REVERSED

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA
PARKERSBURG DIVISION

NO. 6:04-CV-01185

[Filed December 1, 2005]

MICHELE ECKELBERRY, in her capacity as beneficiary,	)
Plaintiff,	)
v.	)
RELIASTAR LIFE INSURANCE COMPANY,	)
Defendant.	)

JUDGMENT ORDER

In accordance with the accompanying Memorandum Opinion and Order granting the plaintiff's motion for summary judgment, the court **ORDERS** that judgment be entered in favor of the plaintiff, and that this case be dismissed and stricken from the docket.

The court **DIRECTS** the Clerk to send a certified copy of this Judgment Order to counsel of record and to any unrepresented party.

ENTER: December 1, 2005

/s/
JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA
PARKERSBURG DIVISION

NO. 6:04-CV-01185

[Filed December 1, 2005]

MICHELE ECKELBERRY, in her capacity as beneficiary,	)
Plaintiff,	)
v.	)
RELIASTAR LIFE INSURANCE COMPANY,	)
Defendant.	)

JUDGES: JOSEPH R. GOODWIN, UNITED STATES DISTRICT JUDGE.

MEMORANDUM OPINION AND ORDER

Pending before the court are cross motions for summary judgment. The court **GRANTS** the plaintiff's motion for summary judgment [Docket 16] and **DENIES** the defendant's motion for summary judgment [Docket 13].

I. Background

Around 3:49 a.m. on March 19, 2004, Earl Eckelberry died in an automobile accident when he struck a tractor trailer

parked on the side of the road. (R. at 8.) The presence of alcohol was confirmed by a toxicology report, which measured Mr. Eckelberry's blood-alcohol level to be 0.15%, an amount 0.05% higher than the legal limit. (*Id.* at 9-12.) At the time of Mr. Eckelberry's death, he was employed by Ames True Temper, Inc. in Parkersburg, West Virginia. (*Id.* at 8.) Mr. Eckelberry had accidental death and dismemberment (AD&D) insurance of $86,000 through his employer's employee benefit plan. (Pl.'s Mot. for Summ. J. 1.) The defendant, ReliaStar Life Insurance Company, is the exclusive administrator of the AD&D plan. (Mem. Supp. Pl.'s Mot. for Summ. J. 3.) The plaintiff, Michele Eckelberry, the beneficiary under her husband's policy, filed a claim for death benefits with ReliaStar on March 31, 2004. (R. at 2-3.)

On May 18, 2004, ReliaStar sent a letter to the plaintiff denying the claim because her husband's death was not an "accident" as defined by the policy. (*Id.* at 18-20.) The plaintiff appealed the decision, which ReliaStar's ERISA Appeals Committee affirmed in a July 20, 2004 letter. (*Id.* at 25-28.) Following this final claim determination, the plaintiff brought suit in the Circuit Court of Wood County, West Virginia. ReliaStar removed the action pursuant to 28 U.S.C. § 1441(b) based on this court's federal question jurisdiction. The parties have stipulated that ERISA governs the case. (Stipulations ¶ 1.) This opinion follows the court's determination that the sole legal issue is whether the defendant properly denied the plaintiff's application for death benefits. (Scheduling Order, Jan. 19, 2005.)

II. Standard of Review

According to the plan, the defendant has discretionary authority to determine whether a claimant is entitled to benefits. Specifically, ReliaStar "has final discretionary

authority to determine all questions of eligibility and status and to interpret and construe the terms of this policy(ies) of insurance." (Stipulations ¶ 2.) Because of this language, the court ordinarily would review ReliaStar's decision to deny the plaintiff's application for abuse of discretion. (Stipulations ¶ 3); *Baker v. Provident Life & Accident Ins. Co.*, 171 F.3d 939, 941 (4th Cir. 1999) (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989)). Under that standard, the court will not "disturb any reasonable interpretation by the administrator." *Doe v. Group Hospitalization & Med. Servs.*, 3 F.3d 80, 85 (4th Cir. 1993). As long as the administrator uses a deliberate, principled reasoning process and the decision is supported by substantial evidence, the decision will not be disturbed. *Martin v. Am. Bancorporation Ret. Plan*, 407 F.3d 643, 655 (4th Cir. 2005); *Elliott v. Sara Lee Corp.*, 190 F.3d 601, 605 (4th Cir. 1999). When the plan administrator, however, also has a financial stake in the outcome of the benefits decision, "this deference will be lessened to the degree necessary to neutralize any untoward influence resulting from the conflict." *Doe*, 3 F.3d at 87. Because ReliaStar both insures and administers the payment of benefits under the AD&D plan, its decision to deny benefits will be reviewed using the less deferential standard.

III. Analysis

A. The Reasonableness of the Interpretation

The AD&D plan provides that "ReliaStar Life pays this benefit if you lose your life . . . due to an accident." (R. at 50.) The plan defines an accident as "an unexpected and sudden event which the insured does not foresee." (*Id.* at 65.) ReliaStar denied the plaintiff's claim on the grounds that her husband's death was not an "accident" under the policy. In

the letter denying the plaintiff's claim, ReliaStar explained that Mr. Eckelberry's death was "not unexpected" and therefore was not an accident. (R. at 18-20.) When ReliaStar's ERISA Appeals Board denied the plaintiff's appeal, the Board noted that Mr. Eckelberry "put himself in a position in which he should have known serious injury or death could occur." (*Id.* at 25-28.)

The plaintiff does not argue that the defendant lacked substantial evidence to conclude Mr. Eckelberry was under the influence of alcohol. The only issue is whether ReliaStar's interpretation of the plan's definition of accident was reasonable. This court must examine whether the interpretation was the result of a principled reasoning process and whether it was supported by substantial evidence. In determining whether the plan administrator made a reasonable interpretation, the court can examine multiple factors, including but not limited to a review of (1) the language of the plan; (2) whether the interpretation is at odds with ERISA's requirements; (3) the reasoning process used by the administrator and the extent of the evidence used to make the determination; (4) whether the interpretation is consistent with the plan's goals; (5) whether the interpretation is consistent with the rest of the plan's language; and (6) the fiduciary's motives and any potential conflict of interest. *Booth v. Wal-Mart Stores, Inc.*, 201 F.3d 335, 342-43 (4th Cir. 2000). Thoroughly examining these factors reveals that ReliaStar's interpretation of the policy's definition of "accident" was not reasonable.

1. The Language of the Plan

What is an accident? Courts and underwriters have attempted to answer this apparently simple question for a century and a half. Adam F. Scales, *Man, God, and the*

Serbonian Bog: The Evolution of Accidental Death Insurance, 86 IOWA L. REV. 173, 175 (2000). One court described the question as "one of the more philosophically complex simple questions" in the law. *Fegan v. State Mut. Life Assurance Co.*, 945 F. Supp. 396, 399 (D.N.H. 1996). Whenever an insurer derives a seemingly impenetrable definition, "the endless cup-chain of events has dipped down into the bottomless well of evolution and brought to the surface a new and unthought-of combination of circumstances, smashing the formula into little bits." *Scales, supra,* at 190 (quoting Edson S. Lott, *Accident Insurance,* 26 AM. ACAD. POL. & SOC. SCI. ANNUALS 483, 483 (1905)). Attempts to create a perfect definition for an accident have led to a horde of cases, which to review properly would require the writing of a treatise. One scholar who courageously attempted this endeavor explained, "[t]he jumbled mass of precedent which has steadily accumulated on the judicial shores over the past 150 years attests the Scylla or Charybdis[1] nature of the task." *Scales, supra,* at 191.

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[1] In Greek mythology, the monster Scylla and the whirlpool Charybdis occupy opposite sides of a treacherous strait. Scylla has "twelve mis-shapen feet, and six necks of the most prodigious length; and at the end of each neck she has a frightful head with three rows of teeth in each, all set very close together, so that they would crunch anyone to death in a moment . . . . No ship ever yet got past her without losing some men, for she shoots out all her heads at once, and carries off a man in each mouth." HOMER, THE ODYSSEY, Book XII. Charybdis, however, is such a powerful whirlpool that ships are forced to hug the side of the strait where Scylla lurks. *Id.* Ulysses himself lost his "six best men" to the dreadful monster. *Id.*

In reality, few accident insurers attempt the creation of a definition for accident.[2] *Id.* at 192. "The occasional effort typically results in failure." *Id.* at 192-93. In this case, ReliaStar defines "accident" and consequently attempts to navigate the treacherous strait that has doomed other accident insurers. According to ReliaStar's policy, an accident is "an unexpected and sudden event which the insured does not foresee." (R. at 50.) To qualify as an accident under this definition, something must be 1) unexpected, 2) constitute a sudden event, and 3) not be foreseen by the insured. According to the language of this definition, the third element of foreseeability is entirely subjective. No component of objective foreseeability is present in this definition. ReliaStar easily could have written the definition to include an objective component by defining accident as an unexpected, sudden event that the insured *should* not have foreseen. The drafters of the policy, however, chose to use the words "does not foresee" instead of "should not have foreseen."

Was the crash that killed Mr. Eckelberry unexpected? According to the letter initially denying benefits, ReliaStar believes the accident was not unexpected. To say, however, that Mr. Eckelberry expected to crash his car defies logic. Even though he was intoxicated, Mr. Eckelberry expected to drive home safely, not to hit a parked tractor trailer. To sustain ReliaStar's contention that Mr. Eckelberry's crash was not unexpected, Mr. Eckelberry would have had to expect the

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[2] According to Professor Scales, "[a]ccidents exist in the region between two diametrically opposed phenomena. At one end of the continuum lie events that the law has historically, and confusingly, referred to as 'acts of God.' At the other are events resulting from the deliberate and effective exercise of human will. An accident occurs when the gravitational pull of neither pole is strong enough to dominate." *Scales, supra,* at 269.

crash. Arguing, however, that he expected the crash and crashed anyway is analogous to arguing Mr. Eckelberry committed suicide. There is no evidence in the record suggesting Mr. Eckelberry expected his life to end when he chose to drive his car.

Was the crash a sudden event? Mr. Eckelberry lost control of his car and hit a parked tractor trailer. It is beyond doubt that this event was sudden.

Was the crash foreseen by the insured? ReliaStar believes the crash was foreseen by the insured because Mr. Eckelberry was driving drunk. If he foresaw the accident, then how did the accident occur? Merriam-Webster defines "foresee" as "knowing beforehand." If Mr. Eckelberry knew beforehand that he was going to crash his car into a parked tractor trailer and die as a result, he would have avoided the collision. There is no doubt that Mr. Eckelberry's impaired condition could have contributed to the cause of the collision. One of the chief goals of accident insurance, however, is to protect insureds from the effects of their own acts. *Providence Life Ins. & Inv. Co. v. Martin*, 32 Md. 310, 1870 WL 3948, at *2 (Md. Mar. 9, 1870); *Scales, supra,* at 243. Even if an accident results because of the insured's own fault, the insured still expects to receive coverage. *Scales, supra,* at 247. Otherwise, insurers could deny almost any claim under any accident insurance policy on the grounds that the insured contributed to the resulting accident. Having accident insurance would become as useful as socks for fish.

The court finds that Mr. Eckelberry's crash was unexpected, constituted a sudden event, and was not foreseen by Mr. Eckelberry. Therefore, Mr. Eckelberry's crash was an accident as defined by the clear-cut language of ReliaStar's policy. ReliaStar, however, by reasoning that Mr. Eckelberry

"put himself in a position in which he should have known serious injury or death could occur" reads an objective component of foreseeability into the definition. The actual definition in the policy does not contain this objective component. Because ReliaStar's interpretation requires implying a requirement that is not specified by the plain, ordinary meaning of the words used in the plan's definition, the first factor weighs in favor of a finding that ReliaStar's interpretation of the plan was not reasonable.

2. ERISA's Requirements

To consider whether the plan administrator's interpretation conflicts with the substantive requirements of ERISA, the court must first determine whether the interpretation of the plan's definition is consistent with the term's plain, ordinary meaning.[3] There is near-universal agreement among federal courts that the word "accident" lacks an ordinary meaning. *West v. Aetna Life Ins. Co.*, 171 F. Supp. 2d 856, 880 (N.D. Iowa 2001). The First Circuit explained that describing what constitutes an accident is a "metaphysical conundrum." *Wickman v. Nw. Nat'l Ins. Co.*, 908 F.2d 1077, 1084 (1st Cir. 1990). The seminal decision regarding the federal common-law meaning of "accident" is *Wickman v. Northwestern National Insurance Company,* which has been described as the "primary embodiment of federal common law in the area of accidental death benefits." *Bevans v. Iron Workers' Tri-State Welfare Plan*, 971 F. Supp. 357, 361 (C.D. Ill. 1997). In *Wickman,* the ERISA plan's accidental

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[3] In the previous section, the court examined whether the interpretation was at odds with the actual words used in ReliaStar's definition. This section focuses on whether the definition used in ReliaStar's plan is consistent with the true definition of an accident.

death provisions defined accident as "an unexpected, external, violent, and sudden event." *Wickman*, 908 F.2d at 1080.

The *Wickman* court began its analysis by outlining the approach most early federal courts used to determine what constituted an accident. *Id.* at 1085. This approach distinguished accidental means from accidental results. *Id.* Courts employing this analysis required the means causing death to be completely unintentional if the insurance contract insured against "accidental means." *Id.* If the means were in anyway intentional, then the result was not an accident, even if the result was not specifically intended *Id.* Although this approach "may" appear simple enough on paper,[4] it has proven to be entirely artificial in practice. Saying Justice Cardozo was psychic when he predicted that adhering to this artificial distinction would "plunge this branch of law into a Serbonian Bog"[5] is a vast understatement. *See Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491, 499, 54 S. Ct. 461, 78 L. Ed. 934 (1934) (Cardozo, J., dissenting) ("When

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[4] This court does not believe that the distinction is clear on paper either; hence the qualifier "may."

[5] A "Serbonian Bog" was believed to be a lake between Egypt and Palestine in ancient times. According to lore, blowing sand often disguised the lake as a solid-land mass, which lead to the deaths of many unfortunate travelers. In *Paradise Lost,* Milton exclaims, "A gulf profound as that Serbonian Bog, betwixt Damiata and Mount Cassius old, where armies whole have been sunk." The bog supposedly received its name from Sebaket-Bardoil, a former king of Jerusalem who died in the bog on a return from Egypt. In modern parlance, the phrase "Serbonian Bog" is used to refer to a "mess from which there is no way of extricating onself." E. COBHAM BREWER, THE DICTIONARY OF PHRASE AND FABLE (1894).

a man has died in such a way that his death is spoken of as an accident, he has died because of an accident, and hence by accidental means."). The *Wickman* court traced the problems that courts have had with this distinction and rejected this approach in favor of an analysis that "safely circumvents the 'Serbonian Bog.'" *Wickman*, 908 F.2d at 1086.

To determine whether a death was accidental, the court focused its analysis on the reasonable expectations of the insured when the accidental death policy was purchased. *Id.* at 1088. Although the court found that the actual, subjective expectations of the insured are important, it reasoned they should not guide the analysis exclusively because of the difficulty in ascertaining an insured's actual expectations and because an insured's expectations occasionally could be patently unreasonable. *Id.* at 1087-88. To accommodate these concerns, the analysis should proceed in two steps: First, attempt to determine the insured's actual expectations. If there is insufficient evidence to determine the insured's subjective expectations, then determine whether a reasonable person similarly situated to the insured "would have viewed the injury as *highly likely* to occur as a result of the insured's intentional conduct." *Id.* at 1088 (emphasis added). Courts addressing whether deaths or injuries involving intoxicated drivers constitute accidents almost always state they are following *Wickman*'s analysis. These courts, however, routinely fail to apply the two-step test properly, either by skipping step one entirely or by misstating step two.[6] When

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[6] For examples of cases that have found intoxicated drivers' deaths not to be accidents, but have misapplied *Wickman* in the process, see *Jones v. Metropolitan Life Ins. Co.*, 385 F.3d 654, 656 (6th Cir.2004); *Schadler v. Anthem Life Ins. Co.*, 147 F.3d 388, 397 n.10 (5th Cir. 1998); *Cozzie v. Metropolitan Life Ins. Co.*, 140 F.3d 1104, 1110 (7th Cir. 1998); *Clark v. Metropolitan Life Ins.*

reviewing a plan that defines "accident" not in accordance with its generally understood meaning, the court will use the *Wickman* two-step analysis to determine if a death or injury results from an accident. *West*, 171 F. Supp. 2d at 886.

If ReliaStar's interpretation of "accident" was based on reasonable foreseeability in a manner at odds with the *Wickman* analysis, then ReliaStar's interpretation is at odds with the substantive requirements of ERISA. ReliaStar's definition of accident definitely focuses on an event, not on an injury. The *Wickman* court explained that when an accident is defined in terms of an event, this definition "would prompt courts recognizing the distinction between 'means' and 'results' to look at the 'means,' because only the means can be termed an event." *Wickman*, 908 F.2d at 1085. Only if a contract spoke of unexpected injury would a court look at the "results." *Id.* In *Wickman,* the court identified the type of definition that embodied the antiquated accidental means/results distinction: "To constitute an accident under this ['accidental means'] standard, the cause of the injury . . . must be 'unforeseen, unexpected, and unusual; happening or coming by chance without design, that is casual or fortuitous, as opposed to designed or intended.'" *Id.* (citing 10 *Couch on Insurance* 2d § 41:28, 40 (1982)). The definition ReliaStar uses is precisely the kind of definition that *Wickman* targeted as employing the artificial accidental means/results distinction. *See West*, 171 F. Supp. 2d at 886 (finding a plan's definition of accident as "an event which happens by chance, or

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Co., 369 F. Supp. 2d 770, 777 (E.D. Va. 2005); *Mullaney v. Aetna U.S. Healthcare*, 103 F. Supp. 2d 486, 492-94 (D.R.I. 2000); *Metropolitan Life Ins. Co. v.* Potter, 992 F. Supp. 717, 728-29 (D.N.J. 1998); *Walker v. Metropolitan Life Ins. Co.*, 24 F. Supp. 2d 775, 780-82 (E.D. Mich. 1997); *Lincoln Nat'l Life Ins. Co. v. Evans*, 943 F. Supp. 564, 568-71 (D. Md. 1996).

fortuitously, without intention or design, and which is unexpected, unusual and unforeseen" to embody the accidental means test).

ReliaStar's denial of Mrs. Eckelberry's claim states that Mr. Eckelberry "put himself in a position in which he should have known serious injury or death could occur." (R. at 25-28.) This analysis does not follow *Wickman*'s two-step test. ReliaStar skipped step one entirely by failing to examine foreseeability through the eyes of the insured as the common law requires. Instead, ReliaStar examined foreseeability only through the eyes of ReliaStar. In the letter denying Mrs. Eckelberry's appeal, ReliaStar explained, "We believe that an individual driving with a blood alcohol level above the legal limit knowingly puts themselves at risk for serious injury or death." (*Id.*) This interpretation fails to comport with the federal common-law definition of "accident" as formulated by *Wickman*.[7] Therefore, this interpretation is at odds with the substantive requirements of ERISA. Accordingly, the second factor weighs in favor of a finding that ReliaStar's interpretation of the plan was not reasonable.

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[7] Although the court must look to federal common law when analyzing the terms of an ERISA plan, the court may look to state law for guidance to the extent state law does not conflict with ERISA or its policies. *Griggs v. E. I. DuPont de Nemours & Co.*, 385 F.3d 440, 441 n.4 (4th Cir. 2004); *Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1452 (4th Cir. 1992). West Virginia courts, however, continue to recognize the distinction between accidental means and accidental results. *Floyd v. The Equitable Life Assurance Soc'y of the United States*, 164 W. Va. 661, 264 S.E.2d 648, 650 (W. Va. 1980). Because the state law approach is inconsistent with the federal approach, state law in this case does not provide further guidance on whether ReliaStar's interpretation was reasonable.

3. ReliaStar's Reasoning Process

As stated above, ReliaStar reasoned that because Mr. Eckelberry was intoxicated, his death was not an accident.[8] (R. at 18.) ReliaStar explains the decision not to provide coverage for Mr. Eckelberry's death was made after reviewing the West Virginia Traffic Crash Report, the medical examiner's report, the death certificate, the death claim form, and the insurance policy. (*Id.*) At no point does ReliaStar explain how it concluded that being intoxicated makes an automobile accident something other than an actual accident. ReliaStar does not identify any evidence suggesting that someone with a blood-alcohol content of 0.15% who decides to drive should foresee his death, nor is there any evidence identified to suggest that a death occurring under those circumstances is expected.

No evidence was identified because the evidence clearly shows that a person who drives while intoxicated should not foresee his death as a result. Does driving while intoxicated increase a person's chances of crashing and possibly dying? Absolutely, but so do many other actions that hinder a driver's concentration, such as talking on a cell-phone, applying lipstick, trying to subdue screaming children, or attempting to locate the correct station on a satellite radio. Even though the person performing these actions increases the likelihood of dying in a crash, it defies reason to suggest that

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[8] It is difficult to imagine how an insurance company can reasonably believe that Mr. Eckelberry's death was not a true accident. One scholar points out that insurance companies should just acknowledge the fact that drunk driving deaths are accidents, yet are caused by "particularly stupid" behavior. *Scales, supra,* at 301. This acknowledgment would avoid "the tortured jujitsu necessary to characterize such events as nonaccidents." *Id.*

the resulting crash is not an accident. Likewise, although a person that gets behind the wheel of a car while intoxicated increases the likelihood of dying in a crash, it is illogical to suggest that the driver reasonably foresaw that result.

According to the National Highway Traffic Safety Administration, 17,419 persons died as a result of alcohol-related traffic deaths in 2002.[9] Although a high number, it is remarkably low when compared to the number of times a person impaired by alcohol got behind the wheel of a car during the same year. The website operated by Mothers Against Drunk Driving states there were more than 159 million alcohol-impaired trips taken during 2002.[10] Based upon these numbers, one out of every 9,128 alcohol-impaired trips results in a crash that causes a fatality. The court is unaware of any mathematical formula to calculate whether a result is reasonably foreseeable, but assumes that if a result has a 1-in-9,128 chance of occurring, it is not reasonably foreseeable. Realizing that the number of alcohol-impaired trips taken is an estimate, assume that the number was

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[9] Alcohol Alert, *2002 Drunk Driving Statistics*, http://www.alcohol-alert.com/drunk-driving-statistics-2002.htm (last visited Nov. 28, 2005). The court notes that this number includes fatalities that resulted from crashes in which any driver had a blood-alcohol content of more than 0.01, which means that the number of fatalities from crashes in which a driver was legally intoxicated actually would be lower. Of these 17,419 fatalities, only 8,474 were to drivers. Michael E. Gardner, *Accidental Death Insurance Coverage of Drunk Drivers*, 69 MO. L. REV. 235, 249 (2004).

[10] Mothers Against Drunk Driving, *Stats & Resources*, http://madd.com/stats/ (last visited Nov. 28, 2005).

overestimated by 100 million trips.[11] Even then, only one out of every 3,387 alcohol-impaired trips results in a fatality, a percentage still lower than the chances of being struck by lightning sometime during a person's lifetime.[12] ReliaStar's decision finding death reasonably foreseeable from driving while under the influence is not supported by substantial evidence and was not made through a principled reasoning process. Accordingly, the third factor weighs in favor of a finding that ReliaStar's interpretation of the plan was not reasonable.

4. The Consistency of the Interpretation with the Goals of the Plan

The goal of the AD&D plan is to provide insurance benefits for an insured's loss of life, limb, or sight due to an accident except in cases where an express exclusion is applicable. (R. at 50.) Provisions exist under the policy expressly excluding coverage for suicide, intentionally self-inflicted injury, physical or mental illness, bacterial infection, airplane crashes, armed conflict, injury suffered in military service, injury occurring in the commission of a felony, or injury caused by the use of any illegal drug, narcotic, or hallucinogenic agent. (*Id.* at 50-51.) Based upon ReliaStar's correspondence with Mrs. Eckelberry, it appears that ReliaStar would deny coverage for *any* claim made by an insured who was drunk driving. There is no evidence

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[11] Obviously, suggesting that this number was overestimated by 100 million trips is an extreme example.

[12] National Weather Service, *Lightning Safety*, http://www.lightningsafety.noaa.gov/medical.htm (last visited Nov. 28, 2005)(estimating the chances of a person being struck by lightning sometime in an eighty-year lifetime is 3,000-to-1).

suggesting that ReliaStar considers factors such as how high a driver's blood-alcohol content was, how far the driver was attempting to travel, how familiar the driver was with the roads, or the weather conditions. Instead, ReliaStar simply denies coverage as soon as it determines the insured's blood-alcohol content exceeded the legal limit.

By maintaining this blanket policy, ReliaStar is reading another exclusion into the policy. If ReliaStar wants to exclude accidental death coverage for insureds who are driving while intoxicated, ReliaStar should provide an express exclusion for these situations. In fact, most accident insurance policies expressly exclude this situation. Instead, ReliaStar implies an exclusion not in the policy that frustrates the policy's goal.

By excluding any claim based on an intoxicated driver's death, it is easy to conceive of situations in which accidental death benefits are denied even though the driver failed to contribute at all to the resulting accident. For example, assume a person has a blood-alcohol level of .01 higher than the legal limit and gets in his car to drive two blocks home. While driving below the speed limit, he passes under a raised highway. As he begins to pass, a reckless tractor trailer barrels off the raised highway and smashes onto his vehicle, killing him instantly. The exact scenario would have occurred rather he was completely sober or legally intoxicated, yet under the reasoning that ReliaStar used in this case, coverage would be denied because of his blood-alcohol level.

ReliaStar denied Mrs. Eckelberry's claim for her husband's death solely because he was driving while intoxicated. Although ReliaStar stated that Mr. Eckelberry's death was not unexpected as a result of drinking and driving, there is no evidence that death should be expected when a

person drinks and drives. As explained above, there is a major difference between a result being expected and a result's chances of occurring being increased. Just because the chances of a result occurring are increased certainly does not necessarily mean that the result is to be expected.

By finding Mr. Eckelberry's death "not unexpected," ReliaStar opens the door to exclude coverage for any accident in which an insured engages in some activity that increases the chances of dying. Essentially, ReliaStar is taking the "accident" out of accident. Assume a tourist is walking along the rim of the Grand Canyon. There are two paved trails available for tourists, Trail 1 and Trail 2. Even though each trail is safely located at least ten feet from the edge, Trail 1 is a foot closer to the edge than Trail 2. The tourist, feeling adventurous, chooses Trail 1. A few steps into the trail, the tourist decides to take a picture of a passing ram but while trying to get the perfect angle on his digital camera, he slips on a piece of limestone, awkwardly rolls ten feet, and tumbles off the cliff to his death. Obviously, the tourist increased his chances of dying when he decided to get out of his car and walk along a trail. He then further increased his chances of dying when he adventurously chose Trail 1 instead of Trail 2, which would have given him one additional foot of safety. Is the tourist's death an accident? Yes. Is the tourist's death an accident under ReliaStar's definition of accident? Yes, for the tourist's death was unexpected and he did not foresee falling to his death when he decided to take a picture of the passing ram. Under the reasoning ReliaStar used in Mr. Eckelberry's case, however, ReliaStar could deny coverage because the

tourist's decisions to get out of his car and walk Trail 1 increased his chances of dying.[13]

Alternatively, assume a middle-aged woman decides to unwind after a hard day's work by reading Tolstoy's literary classic *War and Peace*. To relax the emotional roller-coaster that the passionate relationship between Natasha Rostova and Pierre Bezukhov generates, she decides to read while in her hot tub. Unfortunately, somewhere around the end of Chapter XXXIV of Book Eleven she dozes off. As a result, she drowns and dies. An accident? Yes. An accident under ReliaStar's definition of accident? Yes. Under ReliaStar's narrow reading of the term, however, ReliaStar could deny coverage because she increased her chances of dying by deciding to read *War and Peace* while in her hot tub.[14]

Almost any accident imaginable involves a degree of negligence or a decision that somehow increases the chance of the accident's occurrence. *See Scales, supra,* at 298 (arguing that many ERISA courts "evidently do not understand that virtually every car crash may be traced to some failure of

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[13] A district judge in Georgia recently wrote the following in an opinion when questioning an insurer's argument that any increase of hazard beyond "normal" behavior was not accidental: "[I] enjoy[] standing in the middle of big rivers casting bits of hair and fur at fish. This certainly increases the risk of drowning as compared with staying at home and sitting on the couch. Is this not normal behavior? Is the judge's widow to be deprived of protection because of his piscatorial pursuits?" *Buce v. Nat'l Serv. Indus.*, Inc., 74 F. Supp. 2d 1272, 1278 (N.D.Ga. 1999).

[14] Despite this example, the court is sure that many people find Tolstoy's extravagant descriptions of wolf hunts and grand balls riveting.

judgment that fully reveals its dangers only when it is too late. That is precisely why they are accidents."). The fact that negligence or a decision that makes an accident more likely to occur exists does not mean that once the accident occurs, that it was not really an accident. "[I]nsureds expect coverage even for accidents that are their own fault." *Id.* at 247. If a person gets in his car and begins driving home on icy roads, it is obvious that the chances of an accident occurring are enhanced. This increased probability, however, does not in turn make the resulting crash anything other than an accident. Likewise, Mr. Eckelberry obviously made a bad decision when he got in his car to drive home, but the fact he was intoxicated does not mean that the resulting car crash was expected or foreseen. Even though he increased the probability of an accident occurring, the crash was still an accident. ReliaStar's interpretation of accident frustrates the goals of the policy and sets up a slippery slope in which ReliaStar could deny coverage for any alleged "accident." Accordingly, the fourth factor weighs heavily in favor of a finding that ReliaStar's interpretation of the plan was not reasonable.

5. Internal Inconsistencies in the Plan

This factor concerns whether ReliaStar's interpretation renders any other language in the plan meaningless or internally inconsistent. *Finley v. Special Agents Mut. Benefit Ass'n, Inc.*, 957 F.2d 617, 621 (8th Cir. 1992). By interpreting the definition of accident to include any foreseeable risk of death, the interpretation renders meaningless most of the express exclusions in the policy. For example, why have an explicit exclusion for suicidal behavior if ReliaStar is going to find that conduct carrying a foreseeable risk of death is not an accident? The same can be said for the exclusions relating to intentionally self-inflicted

injury, armed conflict, and the use of illegal drugs. The reason for the list of exclusions is to cover situations in which the conduct would normally constitute an accident but is not treated as such under the policy. The insured can read the list of exclusions when purchasing the policy to see what it covers and what is excluded. By reading in an exclusion not expressly listed, the policy becomes internally inconsistent. Although this factor weighs against ReliaStar, the court finds that it is largely just an extension of the fourth factor and is not independently helpful to the analysis.

6. Fiduciary's Motives and
Potential Conflict of Interest

As stated above when considering the level of deference given to ReliaStar's interpretation, ReliaStar served as both the insurer and the entity that decides whether to pay benefits on asserted claims. Naturally, this creates a conflict of interest as ReliaStar will have to lose money on any claims it considers viable. When ReliaStar denies coverage on claims, such as the claim in this case, ReliaStar saves money. Because ReliaStar's interpretation of accident in this case prevented the company from having to pay money on a claim, the interpretation positively affected ReliaStar. Like the fifth factor, however, although it weighs against ReliaStar, it is not extremely helpful to the analysis.

7. The Weighing of the Factors

Carefully reviewing the factors necessary to determine whether ReliaStar's interpretation of the plan's definition of accident was reasonable, the court concludes that it was not. The interpretation was at odds with the ordinary meaning of the words that ReliaStar used to define accident; it was at odds with ERISA's substantive provisions as developed through

federal common law; the reasoning process used to arrive at the decision was not supported by substantial evidence; and the interpretation was inconsistent with the goals of the AD&D plan. ReliaStar's interpretation of the definition it uses to define accident was unreasonable in this case. Mr. Eckelberry died in an accident and his family should be entitled to accidental death benefits.

B. Common Sense

The list of factors the court must consider in determining whether ReliaStar's interpretation was reasonable is nonexhaustive. *See Booth*, 201 F.3d at 342-43 ("a court may consider, but is not limited to, such factors"). The court finds that more important than any of the factors already considered is genuine common sense.[15] It defies reason to argue that Mr. Eckelberry expected to die when he got behind the wheel of his car. Likewise, it defies reason to argue that he foresaw his death, or even that he should have foreseen it.

The defendant contends it is well settled in the Fourth Circuit that an intoxicated driver's death can never be an accident. (Def.'s Mem. Supp. Mot. for Summ. J. 1.) The Fourth Circuit discussed this issue in *Baker v. Provident Life & Accident Insurance Company*. In that case, Thomas Baker was denied health care benefits by Provident Life and Accident Insurance Company. *Baker*, 171 F.3d at 940. Mr. Baker, who had a blood-alcohol content of 0.286, attempted

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[15] After all, according to John Rawls, a "liberal democracy, in order to meet its definitional requirements of placing sovereignty in free and equal citizens, must base its policies on reasons that are equally available to all citizens, whatever their underlying beliefs." Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 471 (1996) (discussing John Rawls' *Political Liberalism*).

to pass a car by crossing over the double yellow line on the highway. *Id.* at 941. When attempting the pass, he crashed into an oncoming vehicle and killed that vehicle's driver. *Id.* Mr. Baker pled guilty to involuntary manslaughter, which was a felony under North Carolina law. *Id.* His health care benefit plan explicitly excluded coverage for injuries sustained in the voluntary participation of a felony. *Id.* The court held that because Mr. Baker's drinking and driving were voluntary, so was his commission of involuntary manslaughter. *Id.* As a result, the court affirmed a grant of summary judgment in favor of the insurance company. *Id.*

The court analogized the issue of Mr. Baker's voluntariness with accidental death benefits cases. *Id.* at 942. The court first looked to North Carolina state law, but the case it reviewed was decided in 1957 and embodies the accidental means/result distinction that has been criticized heavily by other federal courts. *See Allred v. Prudential Ins. Co. of Am.*, 247 N.C. 105, 100 S.E.2d 226 (N.C. 1957)("nor is it produced by accidental means").

The *Baker* court then looked to other federal courts that have dealt with drunk driving accidents. *Id.* It stated that a majority of federal courts have found that an intoxicated driver's death is not an accident. *Id.* The court then used this rule and analogized it to Mr. Baker's voluntariness. *Id.* The federal cases relied on by *Baker,* however, are those cases cited in footnote six of this opinion that assert they are following the two-step test laid out in *Wickman,* but actually skip step one entirely or misstate the second step.[16] At no

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[16] *See* Michael E. Gardner, *Accidental Death Insurance Coverage of Drunk Drivers*, 69 MO. L. REV. 235, 245-46 (2004) ("A recent decision, *West v. Aetna Life Insurance Co.*, expounded

point does the *Baker* court actually step back and conduct a *Wickman* analysis of its own to determine whether an intoxicated driver's death is an accident, for this analysis would have been misplaced in *Baker* as the issue was not critical to the holding.[17] Because any discussion of this issue in *Baker* was dicta, this court is not bound by that discussion.

When *Wickman*'s two-step test[18] is applied to the case at bar, it becomes obvious that Mr. Eckelberry's death was an accident. First, the court must attempt to determine the

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on . . . the way federal courts have applied the *Wickman* test in the drunk driving context. The *West* court criticized other courts' reliance on blood alcohol content levels to conclude that death is 'highly likely' to result from driving drunk. The court acknowledged that these things show that drunk driving is 'irresponsible and dangerous,' but maintained that driving drunk is not 'highly likely' to result in the driver's death."); *see also Scales, supra,* at 297 ("[S]everal ERISA decisions have misused *Wickman*'s quasi-objective test in ways that may appeal greatly to moralists, but that advance not at all the task of determining whether an accident has occurred.").

[17] Not having thoroughly analyzed an issue hardly makes it well settled. In *Poeppel v. Hartford Insurance Company,* the Fourth Circuit issued an unpublished opinion erroneously stating that *Baker* "adopted the rule" that an intoxicated driver's death cannot be an accident. *Poeppel v. Hartford Ins. Co.*, 87 Fed. Appx. 885, 886, 2004 U.S. App. LEXIS 2575, at *3 (4th Cir. 2004) (unpublished). To the extent that the unpublished *Poeppel* decision finds this issue well settled, this court disagrees. This court also notes that unpublished opinions are not binding authority. *United States v. Ruhe*, 191 F.3d 376, 392 (4th Cir. 1999).

[18] The *Baker* court actually cites *Wickman* on two occasions. *Baker*, 171 F.3d at 942.

insured's actual expectations. This step is completely ignored by most federal courts, including those cases that the *Baker* court cited. In this case, it is simple to determine the insured's actual expectations. Undoubtedly, Mr. Eckelberry expected to drive home. His blood-alcohol level was 0.15 and he did not foresee himself dying on the way.[19] If there is insufficient evidence to determine the subjective expectations of the insured, *only* then should the court consider whether a reasonable person similarly situated to the insured "would have viewed the injury as *highly likely* to occur as a result of the insured's intentional conduct." *Wickman*, 908 F.2d at 1088 (emphasis added). Reviewing the evidence regarding the odds of dying when drinking and driving, it cannot be said that a reasonable person can view drinking and driving as reasonably foreseeable, let alone "highly likely," to cause death. Under the *Wickman* analysis, intoxicated drivers' deaths are accidents. *See Metropolitan Life Ins. Co. v. Potter*, 992 F. Supp. 717, 730 (D.N.J. 1998) ("The court cannot find as a matter of law that death is 'highly likely to occur' as a result of drunk driving and that 'any other expectation would be unreasonable' where many drunken drivers survive to be prosecuted or perhaps repeat their risky conduct.").

To hold otherwise is to impute society's moral concerns about drunk drivers ahead of sound reason. *See Scales, supra,* at 298 n.531 (asserting courts that find intoxicated driver deaths not to be accidents interpret the term "accident" to embrace "an unwritten morals clause"). The true definition of accident should not be discarded depending on whether the conduct involved is morally condemned. Professor Adam F.

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[19] In *Baker*, Mr. Baker's blood-alcohol content was 0.286, which obviously increased the chances for a fatality dramatically more than Mr. Eckelberry's case.

Scales, Associate Professor of Law at Washington and Lee University, explains the problem well: "Drunk driving accidents are simply more senseless, more unforgivable, and altogether more deserving of moral disapprobation than other accidents. But they are accidents nonetheless." *Id.* at 299. Automobile crashes, regardless of how they are caused, whether by icy road conditions or intoxicated drivers, are accidents.[20] "'The common speech of men' is both unanimous and correct in describing such crashes as accidental. To hold otherwise is to sanction the deception of the public." *Id.* at 302.

IV. Conclusion

ReliaStar's interpretation of the definition of accident as it appears in the AD&D plan issued to Mr. Eckelberry was not reasonable. As a result, the court finds that Mrs. Eckelberry's claim for death benefits was not properly denied. Accordingly, the court **GRANT** the plaintiff's motion for summary judgment [Docket 16] and **DENIES** the defendant's motion for summary judgment [Docket 13].

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: December 1, 2005

/s/
JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE

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[20] Unless, of course, there is an intent to commit suicide present.

No. 06-1150

FILED
MAR 23 2007
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SUPREME COURT, U.S.

In The Supreme Court of the United States

MICHELE ECKELBERRY,
in her capacity as beneficiary,

Petitioner,

v.

RELIASTAR LIFE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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I

QUESTION PRESENTED

This case involves a claims decision under an employee welfare benefit plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* The question presented is as follows:

Whether Respondent ReliaStar Life Insurance Company reasonably denied Petitioner Michele Eckelberry's claim for accidental death benefits under the Plan where it was undisputed that the insured died as a result of driving while legally intoxicated, where the Plan defined "accident" as "an unexpected and sudden event which the insured does not foresee," and where the Plan granted ReliaStar final discretionary authority to interpret and construe the Plan and make claim determinations?

II

CORPORATE DISCLOSURE STATEMENT

ReliaStar Life Insurance Company is a wholly-owned subsidiary of Lion Connecticut Holdings, Inc., which is a wholly-owned subsidiary of ING America Insurance Holdings, Inc., which is a wholly-owned subsidiary of ING Insurance International B.V. (Netherlands), which is a wholly-owned subsidiary of ING Verzekeringen N.V. (Netherlands), which is a wholly-owned subsidiary of ING Groep N.V. (Netherlands), a publicly-held company.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-16a) is reported at 469 F.3d 340. The decision of the district court (Pet. App. 19a-43a) is reported at 402 F. Supp. 704.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 2006 (Pet. App. 1a-2a). The petition for writ of certiorari was filed on February 14, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. Petitioner's Claim.

Petitioner Michele Eckelberry ("Petitioner") filed this lawsuit against Respondent ReliaStar Life Insurance Company ("ReliaStar") in West Virginia state court, seeking declaratory relief under West Virginia law. In her lawsuit, Petitioner sought $86,000 in accidental death benefits arising out of the death of Earl Eckelberry ("Eckelberry"), who was insured under an employee welfare benefit plan issued to his employer by ReliaStar (the "Plan"). ReliaStar removed the matter to the United States District Court for the Southern District of West Virginia, which had federal-question

jurisdiction under ERISA, 29 U.S.C. § 1132(e), and 28 U.S.C. § 1331.

Eckelberry died after losing control of his vehicle and crashing it into a tractor trailer, which was parked eight feet beyond the highway shoulder.[1] Pet. App. 4a-5a, 12a. Eckelberry's blood alcohol content at the time of the collision was .15 percent – 50 percent above West Virginia's then legal limit. Pet. App. 5a, 12a. The collision occurred at 3:49 a.m. Pet. App. 5a, 12a. Eckelberry was not wearing a seat belt. Pet. App. 5a, 12a.

2. ReliaStar's Claims Determination.

The Plan defines "accident" as "an unexpected and sudden event which the insured does not foresee," and provides that ReliaStar has "final discretionary authority * * * to interpret and construe the terms" of the insurance policy. Pet. App. 5a. In reviewing Petitioner's claim for accidental death benefits, ReliaStar analyzed the applicable Plan language, the West Virginia Traffic Crash Report, the Toxicology Report, the West Virginia Office of the Chief Medical Examiner's Report, and the Death Certificate. Pet. App. 5a., 31a. As those reports made clear, Eckelberry's car crash was "perfectly consistent with his inebriated state." Pet. App. 11a. The Toxicology Report explained, for example, that the "[t]ypical effects" of a blood-alcohol

[1] Despite Petitioner's statement to the contrary (Pet. 3), there is no evidence in the record that the tractor trailer was "illegally parked."

concentration of 0.15 percent include "blurred vision, loss of motor coordination and impaired judgment." Pet. App. 12a.

ReliaStar denied Petitioner's claim for accidental death benefits, concluding that because Eckelberry died as a result of driving while legally intoxicated, his death was not "unexpected" and, therefore, not an "accident" as defined by the Plan. Pet. App. 5a. ReliaStar's Appeals Committee affirmed, finding that Eckelberry had "put himself in a position in which he should have known that injury or death would occur[,]" because by driving under the influence, he "knowingly pu[t] [him] sel[f] at risk for serious injury or death." Pet. App. 5a-6a.

Despite Petitioner's suggestion that the decision of ReliaStar should have been based on "hard statistical evidence" (Pet. App. 6), Petitioner never submitted any statistical evidence to ReliaStar and, therefore, no statistical evidence was contained in the administrative record.

3. The Decisions of the Courts Below.

In the district court, the parties stipulated that because the Plan contained express language conferring discretion on ReliaStar to interpret and construe the terms of the insurance policy, the district court should apply an abuse of discretion standard of review. Pet. App. 21a. The parties brought cross motions for summary judgment based solely upon the administrative record. The district court granted Petitioner's motion for summary judgment and denied ReliaStar's cross motion, concluding that ReliaStar's interpretation of the Plan

and its decision to deny accidental death benefits were unreasonable. The district court based its conclusion in large part on statistical evidence that was neither part of the administrative record nor, for that matter, submitted to the district court by the parties. Pet. App. 32a-33a. In so doing, the district court afforded ReliaStar's decision none of the deference it was due, and instead substituted its own judgment for that of ReliaStar.

The court of appeals reversed, holding that "under the policy as written" and "the circumstances" surrounding Eckelberry's death, it was "reasonable for ReliaStar to conclude that because the insured 'put himself in a position in which he should have known serious injury or death could occur' his death was not 'unexpected.'" Pet. App. 16a. As the circuit court noted, ReliaStar's conclusion found "considerable support in the record." Pet. App. 11a. Indeed, it was supported by "[b]oth the facts and the inferences that could reasonably be drawn from them," which were "uncontradicted by any evidence submitted on [Petitioner]'s behalf." Pet. App. 11a.

In reaching this decision, court of appeals explicitly limited the scope of its holding, stating:

> Finally, we emphasize the boundaries of our holding. We do not suggest that plan administrators can routinely deny coverage to insureds who engage in purely negligent conduct or, for example, to anyone that speeds. In fact, accident insurance is often purchased to cover negligence at its most typical.
>
> * * *

> Although some courts have suggested that car crashes caused by drunk driving can never be accidents, *we cannot anticipate every future set of circumstances and do not adopt a per se rule*. Rather, it is well settled that a plan fiduciary must assess all of the facts and circumstances attending a claim, afford the insured adequate opportunity to address the causes and circumstances surrounding any occurrence, and make a reasoned, principled assessment supported by substantial evidence. Here, however, the undisputed facts presented to the Plan administrator go a long way toward establishing that the insured's death was not accidental.
>
> We in no sense intend to make light of the loss that plaintiff has suffered. We simply confirm as a matter of law that the Plan administrator's ruling was a reasonable one under the policy as written.

Pet. App. 15a-16a (emphasis added) (citations omitted).

ARGUMENT

1. This ERISA Claims Decision does not Present an Important Federal Question Warranting Supreme Court Review.

Petitioner has characterized the question presented as follows: "When a person is negligent, to any degree, in causing an automobile wreck that results in [his or her] death, has that person died as a result of an accident?" Pet. i. This characterization of the purported issue is terribly

misleading. As the court of appeals went to great lengths to stress in its opinion, it did not establish a *per se* rule under which deaths involving negligent operation of motor vehicles could never be held to be accidental. Pet. App. 15a. Indeed, it declined to hold even that car crashes caused by drunk driving could never be accidents. Pet. App. 15a-16a.

Instead, the court of appeal's decision reflects an understanding of the inherently fact-specific nature of ERISA benefits claims, which must be analyzed and resolved on a case-by-case basis. Further, it reflects an understanding of the paramount importance of the applicable policy language in that analysis, and that the outcome of a given case will be impacted significantly by the applicable standard of review. Notwithstanding Petitioner's suggestion to the contrary, the court of appeal's decision was limited to a holding that under the language of this Plan, the facts of this case, and the applicable standard of review, it was reasonable for ReliaStar to conclude that Eckelberry's death was not an accident. Pet. App. 16a.

Despite the fact- and case-specific nature of ERISA benefits determinations, Petitioner argues that the court of appeals should have applied a universal definition of "accident" that excludes only those deaths that, based on statistical evidence, are "highly likely" to occur. Thus, ironically, Petitioner would have this Court accept review in order to achieve what she wrongly believes the court of appeals to have done; that is, to create a *per se* rule applicable to all ERISA benefits claims relating to automobile deaths.

Not only is Petitioner's argument ironic, it is flawed for two reasons. First, a *per se* rule is inappropriate given the unique facts, policy language, and level of discretion that exist in each ERISA benefits claim that presents itself. Second, under the applicable, modified abuse-of-discretion standard, the district court and court of appeals were limited to the evidence that was before the plan administrator at the time of the decision. *See Bernstein v. CapitalCare, Inc.*, 70 F.3d 783, 788 (4th Cir. 1995). For this reason, Petitioner's argument that the court of appeals should have adopted a standard based on "hard statistical evidence" is misplaced. Pet. 6. The statistical evidence on which she relies was never presented to the plan administrator and, as a result, should play no part in any court's decision. That the court of appeals chose not to follow the district court in improperly relying on statistics that were not part of the administrative record does not mean that the court of appeals somehow erred by "fail[ing] to address them." Pet. 5. Instead, it reflects the court of appeals' recognition that its consideration must be limited to the evidence that was before ReliaStar at the time of the decision.

The court of appeal's decision was necessarily constrained to the unique facts of this case, the language of the Plan, and the applicable standard of review. The court of appeal's conclusion—that based on the facts, ReliaStar made a reasonable decision under the Plan—simply does not present an important issue warranting this Court's review.

2. The Court of Appeal's Decision is not in Conflict with the Decisions of another United States Court of Appeals.

Petitioner's contention that there is a split among the circuits, and even within the Fourth Circuit Court of Appeal's own decisions, is incorrect. Petitioner bases this contention on her belief that the circuit courts of appeals have inconsistently applied a framework articulated by the First Circuit in *Wickman v. Northwestern Nat'l Ins. Co.*, 908 F.2d 1077 (1st Cir. 1990). This argument warrants a closer look at the actual holding of that case.

As an initial matter, it is important to note that *Wickman* was decided more than fifteen years ago, when "[t]he federal common law of insurance benefits" was "still in its formative stage." *Id.* at 1084. The question before the First Circuit was one of first impression, calling upon it to examine the "emerging jurisprudence of ERISA." *Id.* at 1079. Its first foray into this area has since guided other courts in analyzing questions of coverage under accidental death insurance policies, but was by no means the final word on the subject.

According to Petitioner, the "*Wickman* test" defines the term "accident" to exclude from coverage only those injuries that a reasonable person would have viewed as "highly likely" to occur. But to consider this to be the "*Wickman* test" misses the point of the First Circuit's decision. The court did not set forth to establish a generally applicable definition of "accident." Indeed, the term was already defined in the policy as an "unexpected event." The question

before the First Circuit was whether the district court had erroneously applied that definition to the facts surrounding the insured's death. In so doing, the court attempted to formulate an analytical framework that would enable it to "prevent unrealistic expectations from undermining the purpose of accident insurance." *Id.* at 1088.

Thus, under *Wickman*, if it is possible to ascertain that the decedent actually did not expect an injury similar in type or kind to that suffered, the court then asks whether the "suppositions which underlay that expectation were reasonable." *Id.* But acknowledging the inherent difficulty of ascertaining the "subjective state of mind" of a decedent, as it "cannot be generally known," the court stated that when the decedent's actual expectations cannot be ascertained, the fact finder should then proceed with an objective analysis. *Id.* Applying that analysis, the court asked whether a reasonable person, standing in the insured's shoes, "would have viewed the injury as highly likely to occur as a result of the insured's intentional conduct." *Id.* The court noted that this inquiry "serve[d] as a good proxy for" the relevant question under the policy; namely, what was the insured's "actual expectation." *Id.*

Despite the court's use of the phrase "highly likely," there is nothing talismanic about that formulation. Notably, the *Wickman* decision did not turn on whether a reasonable person in Wickman's shoes would have viewed death as "highly likely" to occur. Instead, the court focused on the reasonableness of his expectations. *See id.* at 1089

("Objectively, he reasonably should have expected serious injury").

As the court of appeals recognized, in the years since *Wickman* was decided, different courts have applied the second, objective prong of its analytical framework in different ways. *See* Pet. App. 9a. This does not mean, however, that there is a split among the circuits. Indeed, to conclude that there was a split would require reading *Wickman* to define "accident" in a universal sense, applicable in all cases. This is not what *Wickman* purported to do, and given the highly fact-intensive nature of ERISA benefits claims, it would be inappropriate for any court to attempt to do so. All that can be gleaned from the varying formulations of the "*Wickman* test" is that, in assessing the objective reasonableness of a decedent's expectations under the particular facts of some cases, a definition of accident focusing on whether injury is "highly likely" to occur has represented an appropriate exercise of the plan administrator's discretion, (Pet. App. 9a, n.1), while under the particular facts of other cases, a definition of accident focusing on whether injury is "reasonably foreseeable" has been held to be appropriate. Pet. App. 9a, n.1. As *Wickman* itself demonstrates, these two formulations of "accident" are often intertwined. *See Wickman*, 908 F.2d at 1088-89 (discussing both whether serious injury was "highly likely" to occur and whether decedent "reasonably should have expected serious injury").

Furthermore, Petitioner's statement that other circuits have rejected an approach that defines "accident" in terms of

reasonable foreseeability is simply incorrect. With respect to the Eighth Circuit, Petitioner relies on that court's decision in *King v. Hartford Life & Accident Ins. Co.*, 357 F.3d 840 (8th Cir. 2004) ("*King I*"). Although she notes that the Eighth Circuit granted rehearing *en banc*, she fails to acknowledge that in granting rehearing, the Eighth Circuit vacated that decision. *See id.* at 840. On rehearing, the Eighth Circuit simply did not reach the issue of the reasonableness of the plan administrator's definition of accident. *See King v. Hartford Life & Accident Ins. Co.*, 414 F.3d 994 (8th Cir. 2005). *Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121 (9th Cir. 2002), also relied on by Petitioner, is also inapposite, as it involved a policy's exclusions for "suicide" and "intentionally self-inflicted injuries," not its definition of accident. Petitioner's reliance on *Critchlow v. First UNUM Life Ins. Co.*, 378 F.3d 246 (2nd Cir. 2004), is similarly unavailing. In that case, the Second Circuit concluded, applying *de novo* review to the particular facts of that case, that the insured's death was not an accident. Specifically, the fact that the deceased had "set up an elaborate escape mechanism" established that he had a "subjective expectation of survival," which expectation was "objectively reasonable." *Id.* at 264. Thus, that case turned on the first, rather than the second, prong of the *Wickman* framework. It is notable too that in *Critchlow*, the court declined to adopt a "precise formulation . . . to be applied in all ERISA cases." *Id.*

Petitioner's contention that the Fourth Circuit Court of Appeals has itself "taken inconsistent positions" (Pet. 12) is

also incorrect. Petitioner cites in support of this proposition three pre-ERISA decisions, *Metropolitan Life Ins. Co. v. Henkel*, 234 F.2d 69 (4th Cir. 1956), *Pilot Life Ins. Co. v. Ayers*, 163 F.2d 860 (4th Cir. 1947), and *Zurich General Accident & Liability Ins. Co.*, 33 F.2d 853 (4th Cir. 1929). Each of those cases involved state laws which, unlike the common law that has developed under ERISA, recognized a distinction between "accidental means" and "accidental results." *See Wickman*, 908 F.2d at 1086 (rejecting analytical framework based on distinction between "accidental means" and "accidental results"). Unlike those inapposite prior decisions, the court of appeal's more recent decisions have been consistent in holding that, where supported by language in the applicable policy and the particular facts in the administrative record, the "reasonably foreseeable" formulation can be a reasonable interpretation of the term accident, as is reflected by its decisions in the instant case and in *Baker v. Provident Life and Accident Ins. Co.*, 171 F.3d 939 (4th Cir. 1999), *Poeppel v. Hartford Ins. Co.*, 87 Fed. Appx. 885, 2004 WL 298414 (4th Cir. 2004), and *Watson v. Unum Life Ins. Co.*, 126 Fed. Appx. 604, 2005 WL 665055 (4th Cir. 2005), *cert. denied* 126 S. Ct. 373 (2005).

3. The Court of Appeal's Decision was Based on a Correct Application of the Law to the Undisputed Facts and, therefore, Supreme Court Review is not Warranted.

Operating under the misapprehension that the "*Wickman* test" imposes a single definition of "accident," the district court, and Petitioner, conclude that the court of appeals and the Seventh Circuit, in *Cozzie v. Metro. Life Ins. Co.*, 140 F.3d 1104 (7th Cir. 1998), lowered the standard from one of whether an injury was "highly likely" to occur to one of whether the injury was "reasonably foreseeable." This conclusion is flawed because, as explained above, the "*Wickman* test" is merely a framework for analyzing the objective reasonableness of an insured's expectations; it does not purport to conclusively define accident in all cases regardless of a Plan's express definition of accident, the level of deference granted the Plan's administrator, or the specific facts underlying the claim.

In light of the particular language of this Plan, which expressly defined "accident" as "an unexpected and sudden event which the insured does not foresee" (Pet. App. 5a), and the unique facts underlying Eckelberry's death, the court determined that it was reasonable for ReliaStar to conclude that because he "'put himself in a position in which he should have known that serious injury or death could occur,' his death was not 'unexpected.'" Pet. App. 16a. As the court noted, Eckelberry's car crash was "perfectly consistent with his inebriated state." Pet. App. 11a. "While under the

influence of alcohol, [he] lost control of his vehicle at 3:49 a.m. and ran headlong into a parked semi-trailer located eight feet beyond the highway shoulder[;]" his "blood-alcohol concentration was 0.15 percent -50 percent higher than the [then] legal limit." Pet. App. 11a-12a.

In assessing whether "a reasonable person in [Eckelberry's] shoes would have expected the result," *Wickman*, 908 F.2d at 1089, ReliaStar was entitled to take into account the criminal consequences that often attach to the decision to drive while intoxicated, which consequences stem, in part, from the widely recognized fact that driving while intoxicated threatens the life of the impaired driver and the lives of other motorists. Pet. App. 13a. That ReliaStar, and the court of appeals, took account of those widely recognized dangers does not, as Petitioner argues, represent the elevation of moral value over "hard statistical evidence." Pet. 6. Again, it is important to remember that Petitioner presented no statistical evidence to ReliaStar. But regardless, as the court of appeals explained, a definition of "accident" that excluded only those results that were statistically proven to be "highly likely" would bring within the definition of accident a range of activities that a reasonable person would expect to result in serious harm, even if such harm was not "highly likely."

In this regard, the court of appeal's analogy to a game of Russian Roulette is particularly apt. *See* Pet. App. 13a-14a. As the court noted, "while an insured may not intend to die when he places a single cartridge into a pistol, spins the cylinder, places the gun to his forehead, and pulls the trigger,

such a result is not just an unfortunate accident." Pet. App. 12a. Nor is death highly likely, given the actual odds. Yet a reasonable person should, nonetheless, expect that result. Likewise, the well-established dangers of driving while intoxicated inform a reasonable person of the foreseeable results of that activity; namely, that the impaired driver and others could suffer serious harm, including death.

Finally, contrary to Petitioner's suggestion, ReliaStar's decision to deny benefits under the circumstances of this case does not undermine the purpose of ERISA. As the Seventh Circuit explained in *Cozzie*:

> Whenever a plan fiduciary determines that benefits are not owed under particular circumstances, it does, from the perspective of the claimants in that case, frustrate the purpose of providing assistance. However, as with all insurance arrangements, the plan fiduciary or administrator must ensure that payments are reserved for those who truly fall within the terms of the policy. Otherwise, the financial health of the pooled assets is jeopardized and the cost of providing recovery for future applicants owed assistance is escalated. We cannot say, therefore, that [the insurer's] determination that the purposes of the plan are best served by acknowledging a qualitative difference between the ingestion of a huge quantity of alcohol and other tragedies of human life which do not involve such a significant assumption of a known risk by the insured is incompatible with the goals of the plan.

Cozzie, 140 F.3d at 1110.

As the court of appeals appropriately noted, it was not its role to "search for the best interpretation of [the P]lan or even for one we might independently adopt[,]" but rather to determine whether the plan administrator's decision was a reasonable one under the policy as written. Pet. App. 6a-7a. Its determination that ReliaStar's decision was a reasonable one under the Plan simply does not represent the type of important issue warranting this Court's attention.

CONCLUSION

The court of appeal's decision reflects an understanding of the inherently fact-specific nature of ERISA benefits claims, which must be analyzed and resolved on a case-by-case basis, the paramount importance of applicable policy language in that analysis, and that the outcome of a given case will be impacted significantly by the applicable standard of review. The court of appeal's decision was limited to a holding that under the facts of this case, the language of this particular Plan, and the applicable standard of review, it was reasonable for ReliaStar to conclude that the insured's death was not an accident. This determination simply does not warrant review by the United States Supreme Court. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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MARCH 23, 2007